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No. (1)

Supreme Court, U.S.
FILED

08-850 JAN 6 - 2009

OFFICE OF THE CLERK

In The Supreme Court of the United States

HARRY WHISNANT,
on behalf of himself and all others similarly situated,

Petitioners,

v.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a Corporation; BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

When Petitioner began employment with the State of North Carolina in 1985, he was required to become a contributing member of the Retirement Plan. The Plan statutes are contractual, not policy. Benefits are delayed salaries, not gratuities. The State does not have a reserved right to diminish Plan benefits retroactively. Employees' rights to Plan benefits vest upon working the five years necessary for eligibility to receive benefits. Before Petitioner worked five years, the legislature in 1988 repealed the Plan's 1985 disability statute. Petitioner became disabled and retired in 2000. The Retirement System paid Petitioner disability benefits under the substantially diminished retroactive 1988 statutes. Petitioner alleged that the 1988 legislation, which substantially diminished the 1985 Plan disability benefits, violated the Contract Clause. The *Opinion* below dismissed the case for failure to state a claim.

The *Opinion* conflicts with six State Supreme Courts, the Ninth Circuit Court of Appeals, and raises an important first impression Contract Clause question warranting review by this Court:

Whether the *Opinion* is clearly erroneous in holding: the terms of the public retirement plan contract are established at the time benefits vest after Petitioner worked five years; a contractual obligation exists once an employee's rights have vested; and because Petitioner's benefits did not vest prior to the legislature altering the statutory benefit plan, Petitioner failed to state a claim for relief under the Contract Clause.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceedings below.

Pursuant to this Court's Rule 29.6, the undersigned counsel states that none of the parties to this proceeding are publicly held companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Mr. Harry Whisnant and putative class members ("Petitioners") respectfully submit this petition for a writ of certiorari to review the *Opinion* of the North Carolina Court of Appeals.

OPINION BELOW

The *Opinion* of the North Carolina Court of Appeals is reported at 662 S.E.2d 573 (N.C. App. 2008). The *Order* of the Supreme Court of North Carolina denying the *Petition for Discretionary Review* is reported at 668 S.E.2d 783 (N.C. 2008). The *Order* of the Superior Court is unreported. The *Decision* of the Office of Administrative Hearings is reported at 2006 WL 3771920 (N.C.O.A.H. 2006).

JURISDICTION

The North Carolina Court of Appeals filed an *Opinion* on July 1, 2008. Petitioners filed a *Petition for Discretionary Review* with the Supreme Court of North Carolina on July 30, 2008. The Supreme Court of North Carolina denied the *Petition* by *Order* dated October 9, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts.

U.S. Const. art. I, § 10, cl. 1.

STATUTORY PROVISIONS INVOLVED

N.C. Gen. Stat. § 135-5(c) (1985):

> Disability Retirement Benefits. — Upon the application of a member ... any member who has five [5] or more years of creditable service may be retired ... on a disability allowance: Provided, that the medical board ... shall certify that the member is mentally or physically incapacitated for further performance of duty ..., [and] that such incapacity is likely to be permanent, and that such member should be retired.

Pet. App. 71a.

N.C. Gen. Stat. § 135-5(d4) (1985):

> Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and credible servers he would have had had he continued in service until the earliest

date on which he would have qualified for an unreduced service retirement allowance.

Pet. App. 71a.

N.C. Gen. Stat. § 135-5(d4) (1988):

Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982, but prior to January 1, 1988. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, but prior to January 1, 1988, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and credible servers he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

Pet. App. 72a.

STATEMENT OF THE CASE

The Question Presented raises the most significant first impression Contract Clause question involving a public employee contractual retirement plan to reach this Court in almost three quarters of a century: Whether the *Opinion* is clearly erroneous in holding: the terms of the public retirement plan contract are established at the time benefits vest after Petitioner worked five years; a contractual obligation exists once an employee's rights have vested; and because Petitioner's benefits did not vest prior to the legislature altering the statutory benefit plan, Petitioner failed to state a claim for relief under the Contract Clause.

The *Opinion* is in conflict with six State Supreme Courts, the United States Court of Appeals for the Ninth Circuit, and The Supreme Court Of North Carolina's Decision, *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 483 S.E.2d 422 (N.C. 1997).

A. Factual Background.

Petitioner began employment with the North Carolina Department of Correction in 1985. The Retirement Plan (*Retirement System for Teachers and State Employees*, N.C. Gen. Stat. ch. 135, art. 1, §§ 135-1 to -18.5 (1985)), was in place.[1] Pet. App. 65a-71a, 72a-79a. The Plan required him upon employment to become a Plan member and to

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[1] The Employee Retirement Income Security Act ("ERISA") does not apply to public employee retirement plans. *See* 29 U.S.C. § 1003(b)(1).

contribute 6% of his salary monthly to the Plan's pension fund. N.C. Gen. Stat. §§ 135-3(1), -8(b)(1) (1985). Pet. App. 68a, 73a-74a. Employers of North Carolina's teachers and state employees are required to make actuarial based monthly contributions to the Retirement System's pension fund. N.C. Gen. Stat § 135-8(d)(1), (2). Pet. App. 74a-76a. The purpose of the Retirement Plan is to provide "retirement allowances . . . for teachers and State employees. . . ." N.C. Gen. Stat. § 135-2 (1985). Pet. App. 68a. The Plan's "maintenance of reserves and the payment of all retirement allowances" are "obligations of the pension accumulation fund." N.C. Gen. Stat. § 135-12 (1985). Pet. App. 78a. All "income, interest and dividends derived from deposits and investments authorized by this Chapter shall be used for the payment of the said obligations. . . ." Pet. App. 78a-79a.

The Plan's 1985 terms and conditions for disability retirement are contained in § 135-5(c) and (d4) (1985). Pet. App. 71a-72a. When read in tandem, those two statutes provide: if a teacher or State employee works for five years or more and if the Retirement System Medical Board, on or after July 1, 1982, determines that the employee has become permanently disabled, then the employee shall receive disability retirement benefits calculated as if the employee had worked to age 65 or served 30 years, whichever came first. Pet. App. 71a-72a.

Effective January 1, 1988, the North Carolina legislature retroactively and adversely amended § 135-5(d4) (1985) (the Plan's disability statute in place when Petitioner began employment) before he

completed five years State service and his right to benefits in the Plan vested. Pet. App. 72a. On the same date of the adverse retroactive amendment, § 135-5(d4) (1988) became effective and retroactively applied only to employees who became permanently disabled before January 1, 1988, regardless of the employee's start date. Pet. App. 72a. The *Disability Income Plan of North Carolina*, N.C. Gen. Stat. ch. 135, art. 6, §§ 135-101 to -113 (1988) ("DIP") also became effective January 1, 1988. Pet. App. 80a-91a. The DIP, unlike the Retirement Plan, is not part of an employment contract, and the legislature did reserve the right to amend or repeal the DIP. N.C. Gen. Stat. § 135-113 (1988), Pet. App. 91a.

Petitioner became permanently disabled and began receiving DIP benefits and Social Security Disability Benefits ("SSDB") in 2000. Pet. App. 38a ¶ 14, 39a ¶¶ 15-16. N.C. Gen. Stat. § 135-5(d4) (1985) does not contain a SSDB offset or reduction provision. Pet. App. 72a. The DIP contains a dollar for dollar SSDB offset provision. *Compare* N.C. Gen. Stat. § 135-5(d4) (1985) (Pet. App. 72a) *with* N.C. Gen. Stat. § 135-106(b) (1988) (Pet. App. 88a-89a). The Retirement System calculated Petitioner's disability benefits under the 1988 DIP (enacted about 2½ years after he began work) rather than N.C. Gen. Stat. § 135-5(d4) (1985) (the Retirement Plan statute in place when he began employment). Pet. App. 72a. The Retirement System notified him in October 2005 that the System had failed to offset or reduce his DIP benefits by the amount of the SSDB he had received and had "overpaid" DIP benefits of $30,561.39. Pet. App. 39a ¶ 18. The Retirement System has been retaining part of his

monthly DIP benefits to repay the System the "overpaid" amount. Pet. App. 42a ¶ 27.

B. The Legal Backdrop.

With one factual exception, Petitioner is similarly situated to the disabled retirees in the seminal North Carolina public employee Contract Clause case, *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 363 S.E.2d 90 (N.C. App. 1987), *aff'd per curiam*, 372 S.E.2d 559 (N.C. 1988), the disabled retirees in *Faulkenbury*, 483 S.E.2d 422 (N.C. 1997), and the taxpayer retirees in *Bailey v. State*, 500 S.E.2d 54 (N.C. 1997).[2] Unlike Petitioner, the *Simpson*, *Faulkenbury* and *Bailey* retirees had served the five years necessary for eligibility to receive benefits before the legislature repealed the challenged Retirement Plan statutes.

The Supreme Court of North Carolina long ago established that pensions are delayed salaries. "We held [in *Bridges v. City of Charlotte*, 20 S.E.2d 825 (N.C. 1942)] that pensions for teachers and state employees were delayed salaries. If they [the pensions] were gratuities, we said, they would run afoul of proscription of special emoluments as provided in our state Constitution." *Faulkenbury*, 483 S.E.2d at 427. *Simpson* unpacked the logic of *Bridges*, reasoning: "If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then the employee has contractual rights

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[2] The putative class members are similarly situated to Mr. Whisnant. Pet. App. 45a ¶ 46, 46a ¶¶ 47 & 49.

to it. The agreement to defer the compensation is the contract." *Simpson*, 363 S.E.2d at 94.

Simpson held: (1) "In North Carolina the right of members of the Retirement System to retirement benefits vests after five years of creditable service." *Simpson*, 363 S.E. at 92 n.2 (citing § 128-27(a)(1), (c), Pet. App. 92a & 93a); (2) "[T]he relationship between plaintiffs [firefighters] and the Retirement System is one of contract." *Simpson*, 363 S.E. at 93; (3) "the North Carolina [Retirement Plan] General Statutes create contractual obligations." *Id.* at 93-94; and (4) the plaintiffs had a "contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested." *Id.* at 94.

Faulkenbury observed that *Simpson* is "a case almost on all fours with this case . . .." 483 S.E.2d at 427. *Faulkenbury* and *Bailey* held that the State violated the Contract Clause by reducing promised retirement benefits after the employees had worked the requisite five years for their rights to Plan benefits to vest. *Faulkenbury*, 483 S.E.2d at 429; *Bailey*, 500 S.E.2d at 67. *Bailey* also held that the employees had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested. 500 S.E.2d at 67; *Accord Faulkenbury*, 483 S.E.2d at 428 (reasoning that the employees expected to receive what they were promised at the time vesting).

Faulkenbury rejected the argument that the Retirement Plan statutes "are not promises, but only

state a policy which the General Assembly [the legislature] may change." 483 S.E.2d at 427. *Faulkenbury* then addressed the issue regarding the point in time when the contract between the Retirement System was formed:

> We believe that a better analysis is that at the time the plaintiffs started working for the state or local government, the [Retirement Plan] statutes provided what the plaintiffs' compensation in the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract.

Id.

Faulkenbury further held that the legislature did not reserve the right to diminish the Plan's benefits. "The defendants [State and Retirement System] next contend that the General Assembly reserved the right to amend the retirement plans for state . . . employees by N.C.G.S. § . . . 135-18.4 . . . [This section] . . .. [has] no application to this case." *Faulkenbury*, 483 S.E.2d at 427. The *Faulkenbury* defendants, the same State and Retirement System defendants in this case, acknowledged that "the General Assembly [the legislature] did not originally reserve the right to change the retirement benefits . . . ." *Id.*

The *Opinion*, unlike *Simpson*, *Faulkenbury*, and *Bailey*, functionally imposed a "vested right" as a necessary condition upon the Contract Clause.

The *Opinion*'s first two premises are: (1) "the terms of the contract are established at the time the benefits vest, *i.e.*, five years after petitioner began employment" and (2) "'[i]n the context of retirement benefits, a contractual obligation exists once employee's rights have vested.'" (quoting *Tripp v. City of Winston-Salem*, 655 S.E.2d 890, 894 (N.C. 2008)). Pet. App. 8a & 9a. The parties are in agreement with the *Opinion*'s third premise: "petitioner's benefits did not vest prior to the time the legislature altered the statutory benefit scheme." Pet. App. 9a. The *Opinion* deduced from the three premises the conclusion that Petitioner failed to state a claim for relief. Pet. App. 9a.

C. Proceedings Below.

Mr. Whisnant initially pursued individual administrative remedies in the North Carolina Office of Administrative Hearings ("OAH"). Pet. App. 55a-63a. His claims for administrative relief included a Contract Clause claim. Pet. App. 56a. The Administrative Law Judge issued a *Decision* adverse to Petitioner. Pet. App. 20a-25a. The Retirement System's Board of Trustees affirmed the *Decision*. Pet. App. 18a-19a. Petitioners filed a *Petition For Judicial Review and Class Action Complaint* in the Superior Court of Wake County on February 23, 2007. Both the *Petition* and the *Complaint* included a Contract Clause claim. Pet. App. 32a-48a. Respondents moved to dismiss Petitioner's *Class Action Complaint* pursuant N.C. R. Civ. P. 12(b)(6). Pet. App. 28a-31a. The Superior Court Judge dismissed the *Petition* and *Complaint* by *Order* on 25 June 2007. Pet. App. 11a-16a.

Petitioners filed *Notice of Appeal* to the North Carolina Court of Appeals on July 16, 2007. Pet. App. 26a-27a. The Court of Appeals, without the benefit of oral argument, in a July 1, 2008 *Opinion* affirmed the *Order* on the basis that both the OAH *Petition* and the *Class Action Complaint* did not state a valid claim for relief.[3] Pet. App. 3a-10a. Petitioner filed a *Petition for Discretionary Review* with the Supreme Court of North Carolina on July 30, 2008, which the Supreme Court of North Carolina denied the *Petition* by *Order* dated October 9, 2008. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted on three bases. The North Carolina Court of Appeals decided an important first impression Contract Clause question "that has not been, but should be settled by this Court." Sup. Ct. R. 10(c). The Court of Appeals decided the Contract Clause question "in a way that conflicts with relevant decisions of this Court." *Id.* The Court of Appeals has decided the Contract Clause question "in a way that conflicts with the decisions of" the Supreme Courts of California, Arizona, Washington, Minnesota, Tennessee, and

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[3] "When reviewing the denial of a motion to dismiss pursuant to [N.C. R. Civ. P. 12(b)(6)] the factual allegations in plaintiff's complaint are treated as true." *Isenhour v. Hutto*, 517 S.E.2d 121, 124 (N.C. 1999). A motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6) should not be granted "*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Id.* (italics in original). Judicial review of questions of legal error in OAH decisions are reviewed *de novo*. *Hopkins v. Nash County*, 560 S.E.2d 592, 593 (N.C. App. 2000).

Nevada, and the Supreme Court of North Carolina's *Faulkenbury* decision. Sup. Ct. R. 10(b).

The answer to Question Presented is of paramount importance to thousands of North Carolina employees and disabled retirees. The answer is also of considerable import nationally to public employee contributory retirement plans, in which the State did not reserve the right to retroactively diminish the plan benefits.

The *Petition* is anchored by the following premises and conclusions.

Petitioner began employment with the State of North Carolina in 1985. Upon employment, he was required to become a member of the statutory Retirement Plan. Both the employees and their employers contribute to the Plan. The purpose of the Plan is to provide retirement allowances for teachers and State employees. The legislature did not reserve the right to diminish the Plan's benefits. In 1985 the Plan specified the contractual terms for disability retirement: if a teacher or State employee works for five years or more and if the Retirement System Medical Board, on or after July 1, 1982, determines the employee has become permanently disabled, then the employee shall receive disability retirement benefits calculated as if the employee had worked to age 65 or served 30 years, whichever came first.

In 1988 the legislature retroactively amended the 1985 Retirement Plan disability retirement statute so that the statute applied only to employees disabled after January 1, 1988. The legislature

substituted the DIP, which, unlike the 1985 Plan statute, is not part of an employment contract. The legislature did reserve the right to amend or repeal the DIP. Petitioner became disabled and retired in 2000. He has been receiving the substantially diminished DIP benefits rather than the 1985 Plan disability retirement benefits.

The Contract Clause is a prohibition against States unraveling binding contracts and admits of only limited defeasibility conditions not present in this case. The majority of State Supreme Courts view public retirement plans as unilateral contracts in accordance with the Restatement (Second) of Contracts § 45. The Retirement Plan is a unilateral contract.

Supreme Court of North Carolina precedents have held: (1) the relationship between the employee and the Retirement System is contractual; (2) the Retirement Plan statutes are contractual, not policy; (3) public pensions are delayed salaries, not gratuities; (4) the legislature did not reserve the right to amend the Retirement Plan benefits adverse to the employees; (5) employees must work for five years to be eligible to receive benefits; (6) upon vesting, the employees have a right to rely on terms of the Plan as they existed at the time of vesting; (7) at the time the employees began State employment, the Retirement Plan provided what the employees' compensation in the way of retirement benefits would be; (8) the employees' accepted these offers when they took the jobs; (9) this created a contract; and (10) the employees are entitled to what they bargained for when they accepted employment.

The *Class Action Complaint* alleges that the retroactive repeal of the contractual 1985 Retirement Plan disability statute (which the State did not reserve the right to diminish) and 1988 DIP replacement (which reduced Petitioner's disability benefits, requiring him to "repay" the Retirement Plan $30,561.39 in received benefits) violated the Contract Clause. Pet App. 36a-48a.

The *Opinion* functionally imposed a "vested right" as a necessary condition upon the Contract Clause. The *Opinion*'s first two premises are: (1) "the terms of the contract are established at the time the benefits vest, *i.e.*, five years after petitioner began employment" and (2) "'[i]n the context of retirement benefits, a contractual obligation exists once employee's rights have vested.'" (quoting *Tripp v. City of Winston-Salem*, 655 S.E.2d 890, 894 (N.C. 2008)). Pet. App. 8a-9a. The parties are in agreement with the *Opinion*'s third premise: "petitioner's benefits did not vest prior to the time the legislature altered the statutory benefit scheme." Pet. App. 9a. The *Opinion* deduced from the three premises the conclusion that Petitioner failed to state a claim for relief. Pet. App. 9a.

The *Opinion*'s pivotal premise that the terms of the contract between Petitioner and the Retirement System are established at the time Petitioner's right to retirement benefits vest, five years after he began employment, is entirely without textual foundation in the Retirement Plan and is clearly erroneous. Since the *Opinion*'s pivotal premise is false, the conclusion deduced from that premise is also false. Hence, the conclusion that

Petitioner did not state for relief is also clearly erroneous.

This Court has never held in a Contract Clause case that having a vested right is a necessary condition to state a valid claim for relief for retirement benefits in a contractual public employee contributory retirement plan.

Whether in the field of sports or in the halls of the legislature, it is not consonant with American traditions of fairness and justice to change the ground rules in the middle of the game. The *Opinion* changed the Plan's rules in play at the time Petitioner began his State service and violated a core principle of American justice embodied in the Contract Clause.

Therefore, this *Petition* should be granted.

I. This Case Raises An Important First Impression Contract Clause Question That Has Not Been, But Should Be, Settled By This Court.

A. The Centrality of the Contract Clause.

About whether the Contract Clause is important, no rational doubt exists. James Madison stated that laws impairing the obligation of contracts were "contrary to the first principles of the social compact . . ." *Landgraf v. USI Film Products*, 511 U.S. 244, 267 n.2 (1994) (quoting *The Federalist* No. 44, at 301 (J. Cooke ed. 1961)). *Murray v.*

Charleston, 96 U.S. 432, 448 (1887) states: "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away." *Murray* further observed that preventing the removal of the obligation to perform contracts "was one of the great objects for which the Constitution was framed." *Murray*, 96 U.S. at 449. The intersection of the Contract Clause and contractual public employee retirement plans is "a legal issue of considerable importance." *Parker v. Wakelin*, 123 F.3d 1, 4 (1st Cir. 1997).

B. *Pennie* Left Open The Question Of Whether The Contract Clause Is Activated Upon A Public Employee's Membership In A Contractual Public Employee Contributory Retirement Plan In Which The State Did Not Reserve The Right To Diminish The Benefits.

No modern United States Supreme Court case addresses the intersection at which the Contract Clause attaches to a contractual public employee contributory retirement plan. *Parker*, 123 F.3d at 6. Over a century ago, this Court in *Pennie v. Reis*, 132 U.S. 464, 470-72 (1889) addressed the question of whether California's repeal of a police officer life insurance plan prior to the death of the officer violated the Due Process Clause. *Pennie* reasoned:

since the officer neither received nor controlled the $2 monthly deduction from what was called his salary, the $2 deduction was really always the State's money and, therefore, not really part of his salary. *Id.* Upon finding the deceased officer had no "vested" property right in the continuance of the insurance fund and "no contract" with the State, *Pennie* concluded that repealing the life insurance plan and using the plan's funds for other purposes prior to the officer's death did not violate the Due Process Clause. *Id.*

Aside from the fact that *Pennie* is a Due Process case and the present case is a Contract Clause case, the present case is distinguishable from *Pennie* in four significant respects: (1) the North Carolina Retirement Plan identifies in separate statutes the employee's monthly contribution and the employer's contribution to the Plan, Pet. App. 73a-77a; (2) the Retirement Plan is a contract between the Retirement System and the member employees, *Faulkenbury*, 483 S.E.2d at 427; (3) Retirement Plan benefits are "delayed salaries," *Id.*; and (4) the North Carolina legislature did not reserve the right to diminish the Plan's benefits. *Id.*

The conceptual contents of earned income and salary deductions have evolved considerably since *Pennie*. Among the notable changes in the legal landscape since 1889 is the 1913 enactment of Sixteenth Amendment to the United States Constitution, enabling Congress with the power to tax personal income. About seven decades later, two reluctant taxpayers advanced the *Pennie* gambit upon the Ninth Circuit Court of Appeals. The

taxpayers argued, ala *Pennie* in reverse, that the sums withheld from their federal base pay and deposited into the federal retirement plan were not really their money but, rather, an "employer contribution" to the plan and, therefore, those withheld funds should not be included in their current gross income. *Cohen v. Commissioner*, 543 F.2d 725 (9th Cir. 1976) (per curiam). The *Cohen* Court repelled the *Pennie* gambit, stating that the "taxpayers' reliance on *Pennie*" was "misplaced." *Id.*

The First Circuit Court of Appeals observed in 1996: "times have changed [since *Pennie*]" and "evolving legal doctrine recognizes that the promise of a pension is part of the compensation package that employers dangle to attract and retain qualified employees." *McGrath v. Rhode Island Ret. Bd.*, 88 F.3d 12, 16-17 (1st Cir. 1996). *McGrath* then noted: "In line with this evolving doctrine we have held that, in general, pensions are to be regarded as a species of unilateral contracts." 88 F.3d at 17. The Third Circuit Court of Appeals soon thereafter observed: "most state supreme courts subsequently rejected the [*Pennie*] 'gratuity' approach in favor of an approach that viewed such [retirement] programs as creating implied-in-fact unilateral contracts." *Transport Workers Union of America, v. Southeastern Pennsylvania Transp. Auth.*, 145 F.3d 619, 622 (3d Cir. 1998) (citing *Parker*, 123 F.3d at 6). Hence, *Pennie* has not foreclosed the Question Presented.

C. *Dodge* Left Open the Questions Of Whether And When The Contract Clause Is Activated Upon A Public Employee's Membership In A Contractual Public Employee Contributory Retirement Plan.

In *Dodge v. Board of Education*, 302 U.S. 74, 78-81 (1937) this Court held that the Chicago teachers' tenure and salary statutes, which were not part of an employee contributory retirement plan, were subject to legislative modification without running afoul of the Contract Clause because they were gratuities. *Dodge* expressly left open the question regarding the time when the Contract Clause attaches to a contractual public employee contributory retirement plan. "Since 1895, the state has had legislation creating a teachers' pension and retirement fund, originally the fruit of teachers' contributions . . . With this fund and the benefit payments thereunder, we are not concerned." *Id.* at 75. The question which *Dodge* reserved — the Contract Clause point of attachment to a contractual public employee contributory retirement plan — is now ripe for adjudication by this Court.

D. *Hughes Aircraft* Left Open The Question Of Whether A Vested Right Is A Necessary Condition For The Contract Clause To Attach To A Public Employee Retirement Plan.

The *Opinion* imposed a "vested right" necessary condition upon the Contract Clause. Pet. App. 8a & 9a. This Court, however, has never adopted the view that having a vested right is a necessary condition for Contract Clause protection. Justice Story's 1814 influential definition of impermissible retroactive legislation does contain a vested rights component. "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Landgraf*, 511 U.S. at 269 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (No. 13, 156) (C.C.N.H.1814)). Nonetheless, Justice Story's definition "constituted a *sufficient*, rather than, a *necessary* condition for invoking the presumption against [impermissible] retroactivity." *Hughes Aircraft Co. v. Schumer*, 520 U.S. 939, 947 (1997) (italics in original).[4] This Court has "made no

[4] If an event or state of affairs A is a "sufficient condition" for the occurrence of an event or state of affairs B, then the occurrence of A ensures the occurrence of B. If an event or state of affairs C is a "necessary condition" for the occurrence of an event or state of affairs D, then D cannot occur with the occurrence of Robert E. Rodes, Jr. & Howard Pospesel, *Premises And Conclusions: Symbolic Logic for Legal Analysis* 33 (Prentice-Hall, Inc. 1997).

suggestion that Justice Story's formulation was the exclusive definition of presumptively impermissible retroactive legislation." *Id.* (citing *Landgraf*, 511 U.S. at 269). Although *Landgraf* and *Hughes Aircraft* seem to suggest that a vested right is not a necessary condition for a valid Contract Clause claim, the Question Presented has not been answered within the context of a contractual public employee contributory retirement plan.

II. The Court Below Decided An Important Contract Clause Question Which Conflicts With Decisions Of The Supreme Courts Of California, Arizona, Washington, Minnesota, Tennessee, Nevada, The Supreme Court Of North Carolina's *Faulkenbury* Decision, And The United States Court Of Appeals For The Ninth Circuit Court Of Appeals.

The Third Circuit Court of Appeals observed that the "modern trend in [most State Supreme Courts is] to protect pension rights on the theory that a state's promise of pension benefits represents an offer that can be accepted by the employee's performance." *Transport Workers*, 145 F.3d at 623. Both the First and Third Circuit Courts of Appeals also observed that most State Supreme Courts hold that public employee pension plans create implied-in-fact unilateral contracts. *McGrath*, 88 F.3d at 17; *Parker*, 123 F.3d at 6; *Transport Workers*, 145 F.3d at 623. Nonetheless, significant disagreement exists among State Supreme Courts regarding the point in time Contract Clause protection attaches to public

employee contributory retirement plans. *Parker*, 123 F.3d at 6; *Transport Workers*, 145 F.3d at 623.[5]

The State Supreme Courts of California, Arizona, Washington, Minnesota, Tennessee, and Nevada hold that the Contract Clause attaches to public employee contributory retirement plans at the time employment begins. *Kern v. City of Long Beach*, 179 P.2d 799, 803 (Cal. 1947) (the "employing governmental body may not deny or impair [a contributory retirement plan] . . . at any time after a contractual duty to make salary payments has arisen."); *Yeazell v. Copins*, 402 P.2d 541 (Ariz. 1965) (the right to a pension attaches upon acceptance of employment); *Weaver v. Evans*, 495 P.2d 639 (Wash. 1972) ("There are cases which hold that, since the right to receive a pension does not arise until all the conditions are fulfilled, the employee's rights must depend upon the law as it exists at that time. This view is insupportable."); *Sylvestre v. State*, 214 N.W.2d 658, 666-67 (Minn. 1973) (public employees' contractual rights attach upon employment); *Miles v. Tennessee Consol. Retirement System*, 548 S.W.2d 299, 306 (Tenn. 1977) (Contract Clause protection attaches at the onset of judicial employment); and *Public Employees' Retirement Board v. Washoe County*, 615 P.2d 972, 974 (Nev. 1980) (by "rendering services and making contributions [to the retirement fund], [a public] employee acquires a limited vested right to pension benefits which may not be eliminated or substantially changed by unilateral

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[5] A labyrinthine collection of cases on this subject is contained in R. D. Hursh, Annotation, *Vested right of pensioner to pension*, 52 A.L.R.2d 437 (2008).

action of the governmental employer to the detriment of the member").

Conversely, the Delaware and Oklahoma State Supreme Courts are among the State Supreme Courts holding that the Contract Clause is not activated upon public employment. *Petras v. State Bd. of Pension Trustees*, 464 A.2d 894, 896 (Del. 1983) (Contract Clause rights attach when vesting occurs); *Baker v. Oklahoma Firefighters Pension & Ret. Sys.*, 718 P.2d 348, 353 (Okla. 1986) (Contract Clause rights attach when an employee's plan vests).

The United States Courts of Appeals for the Fourth and Ninth Circuits have reached conflicting conclusions regarding the juncture at which Contract Clause protection attaches to public employee contributory retirement plans.[6] The Ninth Circuit in *State Of Nevada Employees Assoc. v. Keating*, 903 F.2d 1223, 1227 (9th Cir. 1990), concluded: "non-vested employees have contractual rights in pension plans, subject to reasonable modification." The Fourth Circuit in *Kestler* v. *Board Of Trustees Of North Carolina Local Governmental Employees' Retirement System*, 48 F.3d 800, 804 (4th Cir. 1995) took the polar opposite view. *Kestler* held that a law officer had "no claim under the contract clause because he did not have a vested right at the time [the] legislative change was made . . . [and any] right he may have had was not vested until his disability retirement. . ." The Supreme Court of North Carolina cannot, of course,

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[6] The Question Presented in this *Petition* was not addressed in either *Parker*, 123 F.3d 1, *McGrath*, 88 F.3d 12, or *Transport Workers*, 145 F.3d 619.

overrule the United States Court of Appeals for the Fourth Circuit. Nonetheless, *Faulkenbury* demonstrates that *Kestler*'s view regarding when North Carolina public employees become eligible for retirement benefits was erroneous. *Faulkenbury*, 483 S.E.2d at 429.

The *Opinion*'s first premise is: "the terms of the contract are established at the time the benefits vest, *i.e.*, five years after petitioner began employment." Pet. App. 8a. The *Opinion*'s second premise is: "'[i]n the context of retirement benefits, a contractual obligation exists once employee's rights have vested.'" Pet. App. 9a. *Faulkenbury* refutes both premises: the disabled employees "are entitled to what they bargained for when they accepted employment with the state and local governments." 483 S.E.2d at 429.

III. The Court Below Decided An Important Contract Clause Question In A Manner That Was Clearly Erroneous.

A. The Contract Clause Standard Of Review.

This Court exercises independent reasoning and judgment in reviewing Contract Clause cases. Whether a contract is operative within the ambit of the Contract Clause is a federal question. *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992). "The presumption is that [a state law] is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise." *Dodge*,

302 U.S. at 79. State statutes will not be deemed contractual unless the language and circumstances of the statutes are unmistakably intended to create a contract. *U.S. v. Winstar*, 518 U.S. 839, 871-72 (1996). The views of the States' highest court regarding whether there is a contract are accorded "great weight." *Romein*, 503 U.S. at 187. Unless clearly erroneous, those views will be accepted. *Phelps v. Board of Education*, 300 U.S. 319, 323 (1937).

This Court, in any event, is not bound by the State court's interpretation of the terms and conditions of the alleged Contract Clause contract. *Phelps*, 300 U.S. at 322; *Romein*, 503 U.S. at 187. "[W]e are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation. This involves an appraisal of the [pertinent] statutes . . . and the decisions of its courts." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938).

B. The Language, Logic, And Pertinent Precedents Of The Contract Clause.

The Contract Clause states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. "To impair" is "to alter so as to make the contract more beneficial to one party and less to the other than by its terms it purports to be." *Fisk v. Police Jury of Jefferson*, 116 U.S. 131, 135 (1885). An extant obligation "is impaired by a [subsequent] statute

which authorizes its discharge by a smaller sum, or at a different time, or in a different manner than stipulated." *Id.* The prohibitory language of the Contract Clause undoubtedly targets "laws having a retrospective operation upon existing contracts."[7] Even a cursory glance at the terms and sentence structure of the Contract Clause reveals that the Clause is a prohibition against States unraveling contracts.

Although the Contract Clause is drafted in categorical terms, the prohibition against impairment of contracts is defeasible. If, for example, the impairment was reasonable and necessary to protect an important State interest, then the Contract Clause has not been violated. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978); *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). The potential issue of whether any of the defeasibility conditions of the Contract Clause are viable in this case is not presently ripe for adjudication.

The Contract Clause does not contain the term "vested rights." Nor does the Clause text suggest that possession of a vested right is a Contract Clause shibboleth. The concept of "vesting" in the context of a retirement plan merely means that "an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future . .

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[7] *Ogden v. Saunders*, 25 U.S. 213, 303 (1827). "The [offending] law must have a present effect upon some contract in existence, to bring it within the plain meaning of the language employed [by the Contract Clause]. *Id.*

. ." *George v. George*, 444 S.E.2d 449, 450 (N.C. 1994) (citations omitted). The concept of "vesting" neither encapsulates nor entails either a finding or conclusion that the terms of a public retirement plan are established upon the simultaneous occurrence of five years of public service and eligibility for Retirement Plan benefits. Hence, the *Opinion*'s pivotal premise — the terms of the contract between Petitioner and the Retirement System are established at the time Petitioner's right to retirement benefits vest, five years after he began employment — is neither grounded in the statutory Plan, nor logic, nor this Court's precedents.

The proof in this pudding is that the Court in 1844 held that an Illinois statute violated the Contract Clause without imposing a "vested right" necessary condition to establish the violation. *McCracken v. Hayward*, 43 U.S. 608 (1844). As the Court observed: "The obligation of a contract consists in its binding force on the party who makes it. . . . If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract . . . ." *Id.* at 612.

The North Carolina legislature did not reserve the right to diminish the Plan's benefits. *Faulkenbury*, 483 S.E.2d at 427 (1997) (observing that the defendants, the same State and Retirement System defendants in this case, acknowledged that "the [legislature] did not originally reserve the right to change the retirement benefits . . ."). A leading treatise reaches the same conclusion: "If a state is to retain the ability to modify a charter or a pubic contract, it must explicitly so provide in the charter

or in the enabling legislation." Rotunda & Nowak, 2 *Treatise on Constitutional Law: Substance and Procedure* § 15.8, 821 (4th ed. 2007) (citing several cases, including *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 666 (1819) (Story, J. concurring opinion)).

This Court has rejected the view that States have a reserved right to modify their own contracts under the reserved powers doctrine. *U.S. Trust*, 431 U.S. at 23-25; *Accord Murray*, 96 U.S. at 445 ("A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."). Hence, the *Opinion*'s conclusion — that "because petitioner's benefits did not vest prior to the time that the legislature altered the statutory benefit scheme, he failed to state [a claim]" — is false because it is in effect based upon the false premise that the State reserved the right to diminish the Plan's benefits. The *Opinion* is clearly erroneous and conflicts with the principles this Court established in *McCracken* and *Murray* and reaffirmed in *U.S. Trust*.

C. The Retirement Plan Creates A Unilateral Contract Offer Which Petitioner Accepted When He Began Employment.

In modern times, State Supreme Courts have "generally viewed a public pension plan as creating implied-in-fact unilateral contracts." *Parker*, 123 F.3d at 6. A unilateral contract, denominated in the Restatement (Second) of Contracts § 45(1) (2008) as an "option contract," is structured by two

components. The first component is: "Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree . . . begins the invited performance . . . ." *Id.* The second component is: "The offeror's duty of performance . . . is conditional upon completion . . . of the invited performance in accordance with the terms of the offer." *Id.* § 45(2). The Restatement further specifies: "Where part performance . . . by the offeree creates an option contract, the offeree is not bound to complete performance. The offeror alone is bound, but his duty of performance is conditional on completion of the offeree's performance." *Id.* § 45, cmt. e. This rule is "designed to protect the offeree in justifiable reliance on the offeror's promise." *Id.* § 45, cmt. b.

A lucid explanation and application of the First and Second Restatements of Contracts unilateral contract principles within the context of a public retirement plan is provided in *Marvel v. Dannemann*, 490 F. Supp 170 (D.C. Del. 1980). *Marvel* observed: "It is well settled that an offer of a unilateral contract becomes binding and irrevocable when partial performance is rendered by the offeree." *Id.* *Marvel* concluded that a judge not yet eligible for retirement was, nonetheless, protected by the Contract Clause. "[I]t is clear that the State cannot revoke its earlier offer and now demand substantially more in exchange for its promise of a pension than it did when partial performance was begun." *Id.*

Faulkenbury, upon rejecting the argument that the Retirement Plan statutes are expressions of mere policy, specified with considerable clarity the relationship between State employees and the Retirement System in accordance with the structure of a unilateral contract: "We believe a better analysis is that at the time the plaintiffs started working for the state . . . , the statutes provided what the plaintiffs' compensation in the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract." *Faulkenbury*, 483 S.E.2d at 427.

Applying the Restatement (Second) of Contracts § 45 unilateral contract components to the present case yields the conclusion that the Retirement System is irrevocably bound by its offer to Petitioner and accepted by him at the time his employment began. The proper conclusion that the Contract Clause prohibition was activated at the time Petitioner began employment and Plan membership now appears inescapable.

D. The Presumption Disfavoring Contract Is Inapplicable.

The initial step in determining whether the Contract Clause has been violated is to ascertain "whether there is a contractual relationship." *Romein*, 503 U.S, at 185. The presumption that the State did not enter into a contract which restricted the freedom of future legislatures is normally operable. *Dodge*, 302 U.S. at 79 ("The presumption is that [a state law] is not intended to create private contractual or vested rights, but merely declares a

policy to be pursued until the Legislature shall ordain otherwise.").

Even the *Opinion* acknowledges a contractual relationship between State employees and the Retirement System: "The relationship between State employees and the Retirement System is contractual in nature." Pet. App. 9a. The North Carolina legislature is fully aware of the proper method required to insulate a public employee benefit statute from the scope of the Contract Clause. The DIP states that it is not part of an employment contract and may be modified or repealed at any time. N.C. Gen. Stat. § 135-113 (1988). Pet. App. 91a. Hence, there should be no reasoned doubt, consistent with the Restatement (Second) of Contracts § 45, about whether the Retirement Plan is a unilateral contract between Petitioner and the Retirement System. The Supreme Court of North Carolina established in *Bridges* that pensions for teachers and state employees were delayed salaries. 20 S.E.2d 825. The Plan required him upon employment to become a Plan member and to contribute 6% of his salary monthly to the Plan's pension fund. N.C. Gen. Stat. §§ 135-3(1), -8(b)(1) (1985). Pet. App. 68a, 73a-74a. The "agreement to defer the compensation is the contract." *Simpson*, 363 S.E.2d at 94.

It follows, therefore, Petitioner has cleared the *Dodge* presumption that statutes do not create contractual obligations and the *Winstar* hurdle of establishing that the language and circumstances of the Retirement Plan statutes "unmistakably" evince

an intent to create a contract. *Winstar*, 518 U.S. at 871.

E. The *Opinion*'s Pivotal Premise And Conclusion Are Clearly Erroneous.

An assessment of whether the Contract Clause has been violated requires an assessment of the pertinent statutes. *Brand,* 303 U.S. at 100. This assessment involves the application of two threshold principles. "In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute." *Dodge*, 302 U.S. at 78. The "cardinal inquiry" focuses upon the terms of the statutes alleged to have created a Contract Clause contract. *Brand*, 303 U.S. at 104.

The *Opinion* did quote one of the pertinent statutes, § 135-5(d4) (1985). Pet. App. 6a-7a. However, the *Opinion* failed to scrutinize the linguistic content of N.C. Gen. Stat. § 135-5(c) (1985), the statute referenced by Section 135-5(d4) (1985). In sum, the *Opinion* balkanized the contract between Petitioner and the Retirement System.[8]

A conjunctive review of §§ 135-5(c) and (d4) (1985), combined with a proper parsing of the terms contained therein, reveals the nature and content of the Contract Clause contract at bar.

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[8] "Accepted cannons of construction forbid the balkanization of contracts for interpretive purposes." *Smart v. Gillette Co. Long-Term Disab. Plan*, 70 F.3d 173, 179 (1st Cir. 1995).

N.C. Gen. Stat. § 135-5(c) (1985) provides:

Disability Retirement Benefits. — Upon the application of a member ... any member who has **five [5] or more years** of creditable **service** may be retired ... on a disability allowance: Provided, that the medical board ... shall certify that the member is mentally or physically incapacitated for further performance of duty ..., [and] that such incapacity is likely to be permanent, and that such member should be retired.

Pet. App. 71a. (emphasis added).

N.C. Gen. Stat. § 135-5(d4) (1985) provides:

Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982. — Upon retirement for disability, in accordance with **subsection (c)** of this section on or after July 1, 1982, a member **shall receive** a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and credible servers he would have had had he continued in service until the earliest date on which he would have qualified

> for an unreduced service retirement allowance.
>
> Pet. App. 71a-72a (emphasis added).

The 1985 Retirement Plan statutes quoted above specified the terms for disability retirement: if a teacher or State employee works for five years or more and if the Retirement System Medical Board, on or after July 1, 1982, determines that the employee has become permanently disabled, then the employee shall receive disability retirement benefits calculated as if the employee had worked to age 65 or served 30 years, whichever came first.

The statutes utilize the logical language of contract. If the employee does X (works for five years after July 1, 1982) and if the Medical Board does Y (determines the employee is permanently disabled), then the employee shall receive Z (the disability benefits as stated in § 135-5(d4) (1985)). Petitioner has performed X. The Medical Board has done Y. Therefore, Petitioner shall receive Z.

Hence, reading §§ 135-5(c) and (d4) (1985) in tandem reveals that the statutes, neither individually nor collectively, state the *Opinion*'s pivotal premise: "the terms of the contract [between Petitioner and the Retirement System] are established at the time the benefits vest, i.e., five years after petitioner began employment." Pet. App. 8a. The two statutes simply do not state that the terms of the Retirement System contract are established five years after a Plan member begins employment. Nor is the *Opinion*'s pivotal premise

either validly inferable or deducible from the linguistic content of either §§ 135-5(c) or (d4) (1985) or from any other provision or set of provisions of the Retirement Plan.

The *Opinion* is clearly erroneous for yet another reason. The *Opinion*'s pivotal premise states: "the terms of the contract [between Petitioner and the Retirement System] are established at the time the benefits vest, *i.e.*, five years after petitioner began employment." Pet. App. 8a. The entirety of the Plan contract is contained in N.C. Gen. Stat. ch. 135, art. 1, §§ 135-1 to -18.5 (1985). Pet. App. 65a-71a, 72a-79a. The Retirement Plan statutes are contractual. *Faulkenbury*, 483 S.E.2d at 427. Among the contractual Plan statutes is a statute requiring Petitioner's membership and monthly salary deductions to begin immediately upon employment. N.C. Gen. Stat. §§ 135-3(1), -8(b)(1) (1985). Pet. App. 68a, 73a-74a. This mandatory salary deduction statute is undoubtedly a term of the contract. Since this mandatory salary deduction Plan term begins upon employment, it follows that the Plan contractual terms were established at the time Petitioner began employment, not as the *Opinion* falsely contends, five years later. Hence the *Opinion*'s pivotal premise is demonstrably false.

The *Opinion*'s false pivotal premise, lacking any statutory, logical or precedential foundations of this Court, is clearly erroneous. Therefore, the *Opinion*'s conclusion that Petitioner failed to state a claim because his rights to benefits did not vest prior to the legislature's changing the Retirement Plan is

also clearly erroneous because it rests upon the *Opinion*'s false pivotal premise.[9]

Petitioner has cleared the *Phelps* hurdle of establishing that the *Opinion* is clearly erroneous.

F. The *Opinion* Violates The Cardinal Principle Of Justice And Fair Play.

The *Opinion*'s pivotal premise — the Retirement Plan's contract's terms are established five years after employment — violates the cardinal principle of justice. "According to the cardinal principle of justice and fair dealings between government and man, as well as between man and man, the parties shall know prior to entering into a business relationship the conditions which shall govern that relationship. . . ." *Hickey v. Pension Bd.*, 106 A.2d 233, 237-38 (Pa. 1954). *Hickey* continues: "The impairment of contractual obligations by the Legislature is equally abhorrent because such impairment changes the blueprint of a bridge construction when the spans are half way across the stream." *Id. Accord Bailey*, 500 S.E.2d at 65; *Miles*, 548 S.W.2d at 306.

The cardinal principle of justice is consistent with the Restatement (Second) of Contract § 45 and *Romein* and *Landgraf*. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation,

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[9] "There are two conditions that an argument must satisfy to establish the truth of its conclusion. It must be valid, and all its premises must be true." Irving M. Copi, *Symbolic Logic* ch. 1, § 1.3, at 6 (The MacMillan Co. 3d ed. 1967).

because it can deprive citizens of legitimate expectations and upset settled transactions." *Romein*, 503 U.S. at 191. *Landgraf* states the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Landgraf*, 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

The Restatement (Second) of Contract § 45 analysis of a unilateral contract's structure has now joined hands on the field of reason with the cardinal inquiry rule to focus upon the terms of the statutes, the cardinal principle of justice, the historical distain for retroactive legislation, and the Contract Clause. "Whether it be in the field of sports or in the halls of the legislature it is not consonant with American traditions of fairness and justice to change the ground rules in the middle of the game." *Hickey*, 105 A.2d at 238. The *Opinion* changed the Plan's rules in play at the time Petitioner began his State service and violated a core principle of American justice embodied in the Contract Clause.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

Marvin Schiller
Counsel of Record
Schiller & Schiller PLLC
Professional Park at Pleasant Valley
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(919) 789-4677
Counsel for Petitioners January 6, 2009

APPENDIX

Entered October 9, 2008

No. 355P08 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Whisnant v. Teachers' Retirement, etal)

HARRY WHISNANT, on behalf of himself and al others similarly situated

v.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a corporation; BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA

From NC Court of Appeals
(07-1433)
From Wake
(07CVS003105)

****

ORDER

Upon consideration of the petition filed on the 30th day of July 2008 by Petitioners in this matter for discretionary review of the decision of the North

Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 9th day of October 2008.

s/ Hudson, J.

Entered 1 July 2008

NO. COA07-1433

NORTH CAROLINA COURT OF APPEALS

HARRY WHISNANT,
on behalf of himself and
all others similarly
situated,

Petitioner-Plaintiff,

v.

Wake County
No. 07 CVS 003105

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a corporation; BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,

Respondents-Defendants.

Appeal by petitioner from judgment entered 25 June 2007 by Judge J.B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 30 April 2008.

Schiller & Schiller, PLLC, by Marvin Schiller, David G. Schiller, and Kathryn H. Schiller, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for respondents.

ELMORE, Judge.

Harry Whisnant (petitioner) began employment with the State Department of Corrections in 1985. He worked continuously until 1999, when he suffered an on-the-job injury rendering him disabled and unable to perform his work duties. In April of 2000, petitioner began to receive both long-term disability income through the State and Social Security disability benefits from the federal government.

On or about 28 October 2005, Thomas G. Causey, the chief of the Benefits Section of the North Carolina Retirement Systems Division, notified petitioner that although petitioner's long-term disability benefits should have been offset by the amount that he received from Social Security, the system had failed to do so. The retirement system therefore contended that petitioner owed $30,561.39

in overpayments.[1] The retirement system reduced petitioner's monthly payments by $359.00 for eighty-four months in order to recoup the overpaid amount.

On 31 March 2006, petitioner filed a petition against the Teachers' and State Employees' Retirement System of North Carolina; the Board of Trustees of the Teachers' and State Employees' Retirement System of North Carolina; the Department of State Treasurer, Retirement Systems Division; and the State of North Carolina (collectively, respondents) contesting respondents' decision to reduce the amount of long-term disability benefits paid to him. Each side filed a motion for summary judgment, and on 19 September 2006, Administrative Law Judge (ALJ) Beecher R. Gray dismissed petitioner's actions against the Teachers' and State Employees' Retirement System of North Carolina, the Board of Trustees of the Teachers' and State Employees' Retirement System of North Carolina, and the State of North Carolina for failure to state a claim, and granted respondents' motion for summary judgment with regard to the Department of State Treasurer, Retirement Systems Division. On 24 January 2007, the Board of Trustees of the Teachers' and State Employees' Retirement System issued a final agency decision adopting the ALJ's decision in its entirety.

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[1] The Retirement System originally sought repayment of $48,260.64. However, upon the realization that petitioner disclosed the fact that he was receiving Social Security payments as early as May of 2002, the Retirement System reduced the amount owed to $30,561.39 and extended the repayment period to seven years.

On 23 February 2007, petitioner filed a petition for judicial review. At that time, he also added State Treasurer Richard H. Moore and filed a class action complaint. Respondents filed several documents, including a response to the request for judicial review, a motion to sever petitioner's claims, a motion to dismiss all respondents but the Department of State Treasurer, Retirement Systems Division, and a motion to dismiss the class action complaint for failure to state a claim upon which relief can be granted.

On 25 June 2007, the trial court granted respondents' motions to sever and to dismiss all respondents other than the Department of State Treasurer, Retirement Systems Division. The trial court also affirmed the final decision of the Board of Trustees of the Teachers' and State Employees' Retirement System and dismissed the class action complaint. Petitioner now appeals.

On appeal, petitioner first argues that the trial court erred in dismissing the class action complaint for failure to state a claim. We disagree.

The thrust of petitioner's argument is that because the statute governing employee benefits had no setoff when he began work, he is entitled to receive the benefits as they were under that scheme. Respondents counter, and the trial court agreed, that because petitioner was not vested in the earlier plan, respondents were free to change it. The statute in effect at the time petitioner began employment was N.C. Gen. Stat. § 135-5(d4) (1985), which stated:

> Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982. – Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

N.C. Gen. Stat. § 135-5(d4) (1985). Our legislature changed this scheme in 1988, when it adopted a new policy under which disabled workers received disability benefits in lieu of retirement, which were offset by any payments received in the form of Social Security benefits.

Petitioner undertakes an exhaustive analysis of our case law, focusing heavily on *Faulkenbury v. Teachers' & State Employees Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997). In support of his cause, petitioner represents to this Court that "*Faulkenbury's* pivotal *ratio decidendi* is that the disability retirement statutes in existence at the time the employees began their public service are contractual offers which are binding obligations of

the Retirement Systems for determining the formula for calculating the disability compensation due the now disabled employees." Petitioner relies on the following language from *Faulkenbury*: "at the time the plaintiffs started working for the state or local government, the statutes provided what the plaintiffs' compensation in the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract." *Id.* at 690, 483 S.E.2d at 427. However, the Supreme Court expanded on this statement later in its opinion:

> We believe that when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and *who fulfilled certain conditions*, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits *if those persons fulfilled the conditions*. When they did so, the contract was formed. . . . [P]ursuant to the plaintiffs' contracts, they were promised that *if they worked for five years*, they would receive certain benefits if they became disabled.

Id. at 691-92, 483 S.E.2d at 427-28 (emphases added). It is clear to this Court that the terms of the contract are established at the time the benefits vest, *i.e.*, five years after petitioner began employment.

Indeed, our recent cases make it clear that such is the case:

> The relationship between State employees and the Retirement System is contractual in nature. In North Carolina, contractual rights vest in the Retirement System after five years of membership. The contract is embodied in state statute and governed by statutory provisions as they existed at the time the employee's contractual rights vested. [Members of the Retirement System] had a contractual right to rely on the terms of the retirement plan *as these terms existed at the moment their retirement rights became vested.*

Wells v. Consolidated Jud'l Ret. Sys. Of N.C., 136 N.C. App. 671, 673, 526 S.E.2d 486, 488-89 (2000) (quotations and citations omitted) (emphasis added) (alteration in original). Likewise, in a case decided this year, we stated unequivocally that "[i]n the context of retirement benefits, a contractual obligation exists once the employee's rights have vested." *Tripp v. City of Winston-Salem*, ___ N.C. App. ___, ___, 655 S.E.2d 890, 894 (2008) (quotations and citation omitted). Petitioner's entire argument is therefore without merit. Because petitioner's benefits did not vest prior to the time that the legislature altered the statutory benefit scheme, he failed to state any complaint upon which relief could be granted.

Petitioner's only other argument on appeal is that the trial court erred in ruling against him on the basis of the whole record test. In this argument, petitioner states that the Board's findings of fact did not support its conclusions of law, rendering its decision arbitrary, capricious, and erroneous as a matter of law. As petitioner acknowledges, however, "[t]he primary legal issue in the Administrative Appeal is identical to the legal issue that was before the Superior Court on the Retirement System's Motion to Dismiss." We have already held that the trial court's holding on that issue was correct. Accordingly, this contention, too, lacks merit. Based on the uncontroverted evidence that petitioner's rights in benefits did not vest until after the legislature altered the statute governing those benefits, we hold that the trial court properly held in respondents' favor.

Affirmed.

Judges MCGEE and STEPHENS concur.

Entered June 25, 2007

STATE OF NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION
COUNTY OF WAKE
07 CVS 003105

HARRY WHISNANT,
on behalf of himself and all others similarly situated,

Petitioner-Plaintiff,

v.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA,
a corporation;
BOARD OF TRUSTEES OF THE TEACHERS'
AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA,
a body politic and corporate;
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION;
RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and
THE STATE OF NORTH CAROLINA;

Respondents-Defendants.

ORDER

ON MOTION TO SEVER CLAIMS, MOTION TO DISMISS RESPONDENTS FROM PETITION, AFFIRMING DECISION OF BOARD OF TRUSTEES ON JUDICIAL REVIEW AND DISMISSING CLASS ACTION COMPLAINT

This matter was heard by the undersigned Superior Court Judge on motions of Respondents-Defendants (1) to sever the Petition for Judicial Review from the Class Action Complaint, pursuant to Rule 21 of the North Carolina Rules of Civil Procedure; and (2) to dismiss all Respondents except for the Department of State Treasurer, Retirement Systems Division from the portion of the case arising from the Petition for Judicial Review; (3) on Petitioner's Petition for Judicial Review of the Final Decision of the Board of Trustees of the Teachers' and State Employees' Retirement System dated January 24, 2007; and (4) on Defendants' Motion to Dismiss the Class Action Complaint pursuant to Rule 12(b)(6). Petitioner has indicated that he does not object either to Respondents' motion to sever the claims or to the motion to dismiss all Respondents except for the Department of State Treasurer, Retirement Systems Division from the Petition for Judicial Review. The Court, having reviewed Respondents' motions and finding that they are supported by the record, and without objection, hereby allows the motion to sever claims and the motion to dismiss all Respondents except for the Retirement Systems Division from the Petition for Judicial Review.

As to the Petition for Judicial Review, after considering the entire record, and the oral and written arguments of both parties, the Court finds and concludes as follows:

1. Pursuant to N.C.G.S. § 150B-51(a1), the court finds that the Board of Trustees did not hear new evidence.

2. Insofar as Petitioner contends that the Board's findings of fact and conclusions of law are unsupported by competent evidence or are arbitrary and capricious, upon review of the whole record in this matter the Court finds and concludes that the decision of the Board of Trustees, adopting the decision of the administrative law judge, is supported by substantial evidence in the record and is neither arbitrary nor capricious.

3. Pursuant to Petitioner's contentions that the Board's decision was based upon an error of law and was made upon unlawful procedure, the Court adopts a *de novo* standard of review.

4. Petitioner became employed with the North Carolina Department of Correction and became a contributing member of the Teachers' and State Employees' Retirement System ("TSERS") in July 1985.

5. Petitioner worked for the Department of Correction until he incurred an injury in 1999. As a result of this injury, Petitioner applied for and began receiving long-term disability benefits under

the North Carolina Disability Income Plan, N.C.G.S. §§ 135-100, et seq., in April 2000.

6. At the time Petitioner began work, in July 1985, a vested member of the TSERS who became disabled and was no longer able to perform his duties was retired on a disability retirement allowance, pursuant to N.C.G.S. § 135-5(c), the amount of which was determined pursuant to § 135-5(d4).

7. Effective January 1, 1988, the General Assembly adopted the Disability Income Plan, N.C.G.S. §§ 135-100, *et seq.* At the same time, it amended § 135-5(c) to provide that its terms "shall not be applicable to members in service on or after January 1, 1988." Thereafter, members who became disabled and met all the statutory qualifications were entitled to short-term disability benefits for one year, and thereafter to long-term disability benefits, which benefits were calculated differently than the disability retirement benefits. Pursuant to § 135-106, a long-term disability benefit is 65% of the member's compensation prior to disability, and is subject to reductions for Workers' Compensation and Social Security Disability awards. A disability retirement benefit is calculated by multiplying the member's average final compensation by an accrual rate set by the General Assembly, times the number of years of service the member "would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance." § 135-5(d4). Disability retirement benefits are not offset by Social Security disability or Workers' Compensation awards.

8. When Petitioner became disabled, he applied for and began receiving long-term disability benefits in April 2000. In October 2005, when Respondent became aware of an overpayment of long-term benefits as a result of Petitioner's Social Security disability award, it notified Petitioner of the offset of his long-term benefits and his obligation to repay the overpayment. Petitioner filed his petition for contested case hearing on March 31, 2006.

9. Petitioner claims that it was error for the Board of Trustees to affirm the ALJ decision offsetting his long-term disability benefits. Petitioner contends that he is entitled to receive disability retirement benefits, rather than long-term disability benefits, and that disability retirement benefits do not have an offset provision. Petitioner further contends that he is a "vested member of the TSERS under N.C. Gen. Stat. § 135-5(d4) (1985)" and cites *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997) in support of his claim.

10. In *Faulkenbury*, the Supreme Court held that members of the Retirement System who were vested **prior to** the adoption of the Disability Income Plan (January 1, 1988) and who later became disabled would still be eligible for disability retirement benefits. The *Faulkenbury* Court relied upon the decision in *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 88 N.C. App. 218,363 S.E2d 90 (1987), *aff'd per curiam*, 323 N.C. 362,372 S.E.2d 559 (1988), which held that vested employees "had a contractual right to rely on the terms of the retirement plan as these terms existed at the

moment their retirement rights became vested." *Id.* at 223-24, 363 S.E.2d at 94.

11. Under prior North Carolina statutes, a member of the Retirement System became vested in disability retirement benefits after five years of employment. N.C.G.S. § 135-5(c); *Simpson* at 219, n.2 ("right of members of the [Local Governmental Employees'] Retirement System to retirement benefits vests after five years of creditable service."). Petitioner did not have five years of creditable service in the TSERS, and therefore could not have become vested in disability retirement benefits, prior to January 1, 1988, when the General Assembly replaced disability retirement benefits with the Disability Income Plan. Therefore, Petitioner did not have a vested right in disability retirement benefits.

12. The Board's final agency decision to calculate Petitioner's long-term disability benefits pursuant to N.C.G.S. § 135-106 did not violate any statutory or constitutional right of the Petitioner under the constitution and laws of this State or of the United States.

13. The Board did not act in excess of its statutory authority or outside its jurisdiction.

14. The Board did not engage in any unlawful procedure in this matter and did not commit any error of law.

15. In view of all the evidence presented in the entire record, there is substantial evidence that supports the Board's findings and conclusions.

16. The Board's final decision was not arbitrary or capricious.

17. Plaintiff's Class Action Complaint presents the identical factual and legal issues brought forward by Petitioner in his Petition for Judicial Review. In light of the above findings and conclusions, it is therefore determined that the Plaintiffs Class Action Complaint has failed to state a claim on which relief can be granted, and that Defendants' Motion to Dismiss the Complaint should also be allowed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition for Judicial Review and the Class Action Complaint be severed and addressed separately., that the Teachers' and State Employees' Retirement System of North Carolina, the Board of Trustees of the Teachers' and State Employees' Retirement System of North Carolina, Richard H. Moore, and the State of North Carolina are dismissed as Respondents from the Petition for Judicial Review; that the Final Decision of the Board of Trustees of the Teachers' and State Employees Retirement System dated January 24, 2007, is hereby AFFIRMED; and that the Class Action Complaint is DISMISSED.

/s/ J.B. Allen, Jr. 6/25/07
J.B. Allen, Jr.
Superior Court Judge Presiding

Entered January 24, 2007

STATE OF NORTH CAROLINA **COUNTY OF CUMBERLAND**	**BEFORE THE BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM** **OAH NO: 06 DST 0591**
Harry Whisnant, **Petitioner,** **v.** **Department Of State Treasurer, Retirement Systems Division,** **Respondent.**	**FINAL AGENCY DECISION**

THIS MATTER came on before the Board of Trustees of the Teachers' and State Employees' Retirement System at its regularly scheduled quarterly meeting on Thursday, January 18, 2007, in Conference Room 5034 of the Administration Building, Raleigh, North Carolina. This matter was before the Board of Trustees on the Decision of Administrative Law Judge Beecher R. Gray, with Findings of Fact and Conclusions of Law and that the Respondent Retirement Systems Division properly determined that Petitioner was overpaid State long-term disability benefits based upon an

award of Social Security disability benefits, and has begun recovering that overpayment by offsetting Petitioner's long-term benefits.

***

THE BOARD OF TRUSTEES, having reviewed the Decision and the Record in this matter, the written arguments of both parties, and having heard the argument of Respondent, hereby accepts the Decision of the Administrative Law Judge.

NOW, THEREFORE, it is hereby DECIDED that the Decision of Administrative Law Judge Beecher R. Gray, including the Findings of Fact and Conclusions of Law contained therein, is adopted and the decision of the Respondent that it properly determined that Petitioner was overpaid State long-term disability benefits based upon an award of Social Security benefits, and has begun recovering that overpayment by off-setting Petitioner's long-term benefits, is upheld.

This, the 24th day of January, 2007.

/s/ Richard H. Moore
Richard H. Moore, Treasurer
Chairman of the Board of Trustees of the Teachers' and State Employees' Retirement System

Entered September 19, 2006

STATE OF NORTH CAROLINA
IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
COUNTY OF CUMBERLAND
06 DST 5091

HARRY WHISNANT,	)
	)
Petitioner,	)
	)
v.	)
	)
TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; AND THE STATE OF NORTH CAROLINA;	)
	)
Respondent.	)

DECISION

This matter is before the undersigned Administrative Law Judge, upon Respondents' August 21, 2006 motion to dismiss or, in the alternative, motion for summary judgment, under Rules 12(b)(6) and 56 of the North Carolina Rules of

Civil Procedure. Petitioner filed a response to the motions and his own motion for summary judgment on September 11, 2006. Respondent filed a response to Petitioner's motion for summary judgment on September 15, 2006.

After considering the motions and responses of both parties, and the pleadings, the undersigned determines that Respondents' motion to dismiss should be granted as to all Respondents except the Retirement Systems Division and determines that Respondent's motion for summary judgment should be allowed as to the Retirement Systems Division. Petitioner's motion for summary judgment is denied.

1. In his petition, Petitioner alleges violations of various statutory and constitutional provisions arising out of the withholding of a portion of his long-term disability ("LTD") benefits. Of Respondents named, the only one of these entities which Petitioner claims is responsible for that action is the Department of State Treasurer, Retirement Systems Division. Petitioner does not contend that any of the other State entities named as Respondents, separate and apart from the Retirement Systems Division, had any role whatsoever in the withholding of his disability benefits. On that basis, all Respondents except the Retirement Systems Division should be dismissed from this action.

2. Petitioner's sole claim is that the Retirement Systems Division determined that he had incurred an overpayment of his LTD payments, as set forth in his attachments to the Petition. As

explained in those attachments, the overpayment which was assessed was the result of Petitioner's award of Social Security disability benefits.

3. The contractual, statutory, and constitutional rights which Petitioner claims have been violated by the Retirement Systems Division's actions are Petitioner's rights to long-term disability benefits. Those rights are conferred by N.C.G.S. § 135-100, *et seq*.

4. N.C.G.S. § 135-106(b) provides for monthly long-term disability benefits according to a statutory formula. It further provides that a beneficiary's LTD benefit "*shall be . . . reduced*" by the amount of any Social Security disability award which the beneficiary receives. (Emphasis added.)

5. Petitioner has admitted, and it is concluded, that he was awarded LTD benefits effective in April 2000. At that time, Petitioner signed an agreement letter acknowledging his obligation to repay any overpayment of LTD benefits which might arise by virtue of a retroactive Social Security disability award, pursuant to N.C.G.S. § 135-106(b). Petitioner was awarded Social Security disability benefits effective August 1999, which resulted in an overpayment of his LTD benefits.

6. The Retirement System is statutorily authorized to offset Petitioner's long-term benefit in order to recover the overpayment.

> Notwithstanding any provisions to the contrary, any overpayment of benefits

> to a member in a State-administered retirement system or the former Disability Salary Continuation Plan or the Disability Income Plan of North Carolina may be offset against any retirement allowance, return of contributions or any other right accruing under this Chapter to the same person. . . .

N.C.G.S. § 135-9 (2006).

7. While Petitioner asserts that Respondent's efforts to collect the overpayment in long¬term disability benefits violate the State and Federal constitutions, Chapter 135,42 U.S.C. § 1983, and are a breach of "fiduciary duties" owed to Petitioner, it is clear from the facts alleged by Petitioner that the Retirement System correctly applied the provisions of N.C.G.S. § 135-106(b) in determining that there had been an overpayment, and that it is statutorily authorized to collect such overpayment by the offset of future benefits. Moreover, such authority has further been memorialized in a contractual agreement signed by Petitioner.

8. Because Petitioner made reference to a Social Security disability award as early as May 2002, when he submitted to the Retirement System his Statement of Income for 2001, the Retirement System determined that it would not seek to collect any amounts which Petitioner was overpaid after May 2, 2002. It therefore undertook to reduce the amount of the overpayment to $30,561.39, down

from an initial calculation of $48,260.64, and to extend the repayment period to seven years. See Attachments A and B to Petition. Petitioner does not contend that the actual amount of his overpayment was less than $30,561.39.

9. Based on the foregoing, there are no issues of fact to be determined, and Respondents are entitled to judgment as a matter of law. On that basis, the motion of the Respondent Retirement Systems Division for summary judgment is granted.

DECISION

Petitioner has failed to state a claim upon which relief can be granted as to Respondents Teachers' and State Employees' Retirement System of North Carolina, the Board of Trustees of the Teachers' and State Employees' Retirement System of North Carolina and the State of North Carolina, and the petition as to those Respondents is DISMISSED. As to Respondent Retirement Systems Division, the documents of record, including the motions and responses, demonstrate that Petitioner cannot prevail in this contested case as a matter of law. Respondent's motion for summary judgment in favor of the Retirement Systems Division is ALLOWED.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center,

Raleigh, NC 27699-6714, in accordance with G.S. § 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision and to present written arguments to those in the agency who will make the final decision. G.S. § 150B-36(a).

The agency is required by G.S. § 150B-36(b3) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the Board of Trustees of the Teachers' and State Employees' Retirement System.

This the 19 day of September, 2006.

/s/ Beecher R. Gray

Filed July 16, 2007

STATE OF NORTH CAROLINA IN THE
GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE 07 CVS 003105

HARRY WHISNANT,
on behalf of himself and all others similarly situated,

Petitioner-Plaintiff,

v.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA,
a corporation;
BOARD OF TRUSTEES OF THE TEACHERS'
AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA,
a body politic and corporate;
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION;
RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and
THE STATE OF NORTH CAROLINA;

Respondents-Defendants.

NOTICE OF APPEAL

TO: THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Petitioner-Plaintiff, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, hereby gives Notice of Appeal to the North Carolina Court of Appeals from the *Order* signed on June 25, 2007, by Judge J.B. Allen, Jr. filed on June 25, 2007, and served via 1st class mail by Respondents-Defendant's counsel on June 29, 2007.

Respectfully submitted this the 16th day of July, 2007.

SCHILLER & SCHILLER, PLLC

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Filed March 30, 2007

STATE OF NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE
07 CVS 3105

HARRY WHISNANT,
on behalf of himself and all others similarly situated,

Petitioner-Plaintiff,

v.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a corporation;
BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a body politic and corporate;
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION;
RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and
THE STATE OF NORTH CAROLINA;

Respondents-Defendants.

MOTION TO DISMISS PLAINTIFF'S CLASS ACTION COMPLAINT

Rule 12(b)

NOW COME Defendants, by and through their undersigned counsel, and hereby file this Motion Dismiss, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and show the Court::

1. Petitioner-Plaintiff has filed a document captioned "Petition for Judicial Review and Class Action Complaint." Plaintiff's complaint alleges the following pertinent facts:

a. he first became employed with the North Carolina Department of Correction, and became a contributing member of the Teachers' and State Employees' Retirement System ("TSERS"), in July 1985;

b. he worked continuously until around April 2000, accruing about 15 years of creditable service in the TSERS; and

c. as a result of an on-the-job injury Plaintiff began receiving long-term disability benefits under the Disability Income Plan, N.C.G.S §§ 135-100, et seq., in April 2000,

2. In this proceeding, Plaintiff contends that he should be receiving disability retirement benefits, calculated pursuant to N.C.G.S. § 135-5(d4), rather than long-term disability benefits. He

alleges that his "vested right are and have been unlawfully and unconstitutionally impaired, diminished and violated . . ."

3. Both long-term disability benefits arid the former disability retirement benefits have a five year vesting requirement. N.C.G.S. §§ 135-106(a) ("any beneficiary or participant who has had five or more years of membership service may receive long-term disability benefits from the Plan"); 135-5(c) ("any member who has had five or more years of creditable service may be retired . . . on a disability retirement allowance.") According to his own allegations, Plaintiff could have become vested in disability benefits no sooner than July 1990.

4. Plaintiff acknowledges that the Disability Income Plan became effective January 1, 1988. By its own terms, the provisions for disability retirement "shall not be applicable to members in service on or after January 1, 1988." *Id.* In *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997), it was determined that members of the Retirement System who were vested prior to the adoption of the Disability Income Plan (January 1, 1988) and who later became disabled would still be eligible for disability retirement benefits, notwithstanding the language of 135-5(c) that its provisions "shall not be applicable to members in service on or after January 1, 1988."

5. In this proceeding, Plaintiff claims that he is entitled to enforce the statutory provisions for disability benefits that were in place at the time he

began work, in July 1985. In essence, Plaintiff seeks to enforce his "vested right" to a pre-1988 disability benefit, even though his allegations establish that he did not become vested until 1990.

WHEREFORE, based on the foregoing, Defendants pray that the Class Action Complaint be dismissed for failure to state a claim on which relief can be granted.

Respectfully submitted, this the 30th day of March, 2007.

ROY COOPER
ATTORNEY GENERAL

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Filed February 23, 2007

STATE OF NORTH CAROLINA IN THE
GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE
07 CVS 003105

HARRY WHISNANT,
on behalf of himself and all others similarly situated,

Petitioner-Plaintiff,

v.

TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA,
a corporation;
BOARD OF TRUSTEES OF THE TEACHERS'
AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA,
a body politic and corporate;
DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION;
RICHARD H. MOORE, Treasurer of the State of North Carolina and Chairman of the Board of Trustees Teachers' and State Employees' Retirement System of North Carolina (in his individual and official capacities); and
THE STATE OF NORTH CAROLINA;

Respondents-Defendants.

PETITION FOR JUDICIAL REVIEW AND CLASS ACTION COMPLAINT

I. PETITION FOR JUDICIAL REVIEW

Petitioner-Plaintiff Harry Whisnant ("Whisnant") pursuant to Article IV, Chapter 150B of the North Carolina General Statutes, hereby petitions the Superior Court for judicial review of the January 24, 2007 *Final Agency Decision* of the Board of Trustees of the Teachers' and State Employees' Retirement System ("the Board"), which adopted the numbered paragraphs, findings of fact, and conclusions of law of the Administrative Law Judge's ("ALJ") September 19, 2006 *Decision*. The Board's *Final Agency Decision* and the ALJ's *Decision* are attached as **Exhibits 1 and 2**, respectively, and are incorporated herein by reference.

In support of this *Petition For Judicial Review*, Whisnant respectfully objects and excepts to all portions of the ALJ's *Decision* and the adoption thereof by the Board's *Final Agency Decision*, including specifically the following:

1. The numbered paragraphs and findings of fact in the ALJ's *Decision* do not support the conclusions of law contained in the paragraphs entitled Decision and Order.

2. The ALJ's *Decision*'s conclusions of law contained in the paragraphs entitled Decision and Order are erroneous as a matter of law.

3. The ALJ's *Decision*'s paragraphs entitled Decision and Order are erroneous as a matter of law and the ALJ's *Decision* is erroneous as a matter of law.

4. The ALJ's *Decision*'s findings of fact contained in numbered paragraphs 2 and 3 are contrary to the substantial weight of the evidence and the whole record.

5. The ALJ's *Decision* is erroneous as a matter of law because it does not conclude that Whisnant should have had his disability retirement benefits calculated using the formula contained in N.C. Gen. Stat. § 135-5(d4)(1985), consistent with the North Carolina Supreme Court decision, *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, 453 S.E.2d 422 (1997).

6. Whisnant is entitled to an entry of reversal of the Board's *Final Agency Decision* and the ALJ's *Decision* and is entitled to an entry of judgment in his favor.

7. Whisnant's disability retirement benefits should be recalculated in accordance with N.C. Gen. Stat. § 135-5(d4)(1985).

8. Whisnant should be repaid all funds due to him under the aforesaid recalculation in accordance with N.C. Gen. Stat. § 135-5(d4)(1985) and all funds that the Retirement Systems Division has been retaining due to the Retirement System's

purported overpayment to him under the Disability Income Plan.

9. Whisnant respectfully objects and excepts to the Board's adoption of the ALJ's *Decision* in its *Final Agency Decision.*

10. Whisnant's substantial rights have been prejudiced because the *Final Agency Decision*'s and the ALJ *Decision*'s findings, inferences, conclusions and/or decision are either:

1. In violation of . . . the Constitution of the United States, Art. I § 10, cl. 1; (impairment clause) . . .;

2. In excess of the statutory authority or jurisdiction of the agency for the reasons specified hereinbelow;

3. Made upon unlawful procedure for the reasons specified hereinbelow;

4. Affected by other error of law specified above;

5. Unsupported by substantial evidence admissible under G.S. §§ 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted;

6. Arbitrary or capricious; and/or

7. An abuse of discretion.

II. CLASS ACTION COMPLAINT

Plaintiff Whisnant brings this action on behalf of himself and all other similarly situated and says:

A. PARTIES AND BACKGROUND

1. Plaintiff Whisnant is a citizen and resident of Hope Mills, Cumberland County, North Carolina, is subject to the jurisdiction of this Court, and is a retired member of the North Carolina Department of Correction.

2. Respondent-Defendant TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a corporation, [hereinafter the "TSERS"] has been established pursuant to N.C. Gen. Stat. § 135-2 *et seq.*, and is authorized to conduct all business, invest all of its funds, cash, securities and other property held in accordance with Chapter 135 of the North Carolina General Statutes for the benefit and welfare of members of the System.

3. Respondent-Defendant BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA is the administering Board for the TSERS [hereinafter the "Board"] is a body politic and corporate established pursuant to Chapter 135-6 and is vested with the general administration and responsibility for the proper operation of TSERS, and is the trustee of its funds under Chapter 135-7(a).

4. Respondent-Defendant NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION is an administrative department of the Respondent STATE OF NORTH CAROLINA established pursuant to N.C. Gen. Stat. § 143A-31 *et seq.*

5. Respondent-Defendant STATE OF NORTH CAROLINA is a State of the United States.

6. Respondent-Defendant BOARD is a fiduciary in its relationship with members and beneficiaries of the TSERS, including the Whisnant.

7. Respondent-Defendant RICHARD H. MOORE is the Treasurer of the State of North Carolina, the Chairman of the Board, and the custodian of the funds of the Retirement System under N.C. Gen. Stat. § 135-7(c).

8. All Respondents-Defendants are residents of the State of North Carolina.

9. Plaintiff Whisnant is a citizen and resident of the State of North Carolina.

10. Upon information and belief, more than two-thirds of all putative class members are citizens and residents of the State of North Carolina.

11. Respondents-Defendants' acts complained of herein constitute a[n] . . . impairment of contract . . . as stated hereinbelow. . .

12. Whisnant is a member of TSERS under N.C. Gen. Stat. § 135-55, and at the times herein complained of was entitled to receive benefits under N.C. Gen. Stat. § 135-50, *et seq.*, including specifically N.C. Gen. Stat. § 135-5(d4). The denial of Whisnant's benefits during the period herein complained of caused Whisnant to receive less than the amount of monthly benefits to which he is entitled, as alleged hereinbelow.

13. This is a Class Acton Complaint for recompense of monthly payments of money that have been withheld and will be withheld in trust, and other relief, an Action for a Declaratory Judgment pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and for a Writ of Mandamus or other appropriate order.

B. FACTS GIVING RISE TO WHISNANT'S CLAIMS FOR RELIEF

14. Whisnant began employment with the State of North Carolina ("the State") in July of 1985, serving in the North Carolina Department of Correction, Division of Community Corrections as an Intensive Case Officer. Whisnant completed his continuous service to the State when he retired around April of 2000. During Whisnant's service to the State of North Carolina, he made monthly cash contributions, worked for, earned additional employer contributions to TSERS, and thereby acquired vested rights in TSERS. Whisnant earned a total of about fifteen (15) years of creditable service in TSERS.

15. Whisnant, as a vested member of the TSERS under N.C. Gen. Stat. § 135-5(d4)(1985), contends that Respondents-Defendants have and will continue to unconstitutionally and unlawfully retain his monthly long-term disability benefits beginning on or about February 2006, and unlawfully deducted alleged overpayments from his monthly retirement benefits checks.

16. Whisnant suffered an on-the-job injury on January 20, 1999. Whisnant was left disabled and unable to perform his work duties after surgery related to the on-the-job injury. Whisnant began receiving long-term disability benefits under the Disability Income Plan, N.C. Gen. Stat. § 135-100 *et seq.* in April of 2000. Whisnant also began receiving Social Security benefits in 2000.

17. Whisnant dutifully provided to Respondent-Defendant, Department of Treasurer, Retirement Systems Division copies of the Social Security benefits received by Whisnant on an annual basis, beginning in 2000.

18. Whisnant was notified on or about October 28, 2005 by Thomas G. Causey, Chief of the Benefits Section of the North Carolina Retirement Systems Division, that the Retirement Systems Division had failed to reduce the Whisnant's long-term disability benefit by the amount of Social Security income received for the period beginning April 25, 2000 until October 31, 2005. Retirement Systems Division contended Whisnant was overpaid $48,260.64. The October 28, 2005 letter from Thomas G. Causey is attached herein as **Exhibit 3.**

19. Whisnant received a letter dated November 16, 2005 from Troy Scoggins, Chief of the Accounting Section of the Retirement Systems Division stating that there had been a miscalculation in the alleged overpayment and that the amount owed by Whisnant had been reduced to $30,561.39. The November 16, 2005 letter from Troy Scoggins is attached hereto as **Exhibit 4**.

20. Whisnant diligently contacted representatives of the Department of Revenue, Retirement Systems Division to discuss the matter. Whisnant spoke with Glen Wall of the Retirement Systems Division on several occasions. Mr. Wall informed Whisnant that the Retirement Systems Division lost parts of Whisnant's file on at least two (2) different occasions.

21. Whisnant sent a letter dated November 12, 2005 to appeal the overpayment assessed. Whisnant received a letter dated January 30, 2006 from Respondent North Carolina Department of State Treasurer, Retirement Systems Division Director Michael L. Williamson informing Whisnant that the overpayment of $30,561.39 is final and that Whisnant had the right to appeal the decision in the Office of Administrative Hearings within sixty (60) days. (**Exhibit 5**).

22. Whisnant appealed to the Office of Administrative Hearings and has exhausted all administrative remedies available to him.

23. Respondents-Defendants' aforesaid actions violate Chapter 135 of the General Statutes,

specifically N.C. Gen. Stat. § 135-5(d4), and . . . the Constitution of the United States, Art. 1 § 10, cl. 1 (impairment clause) . . . Whisnant has a vested property right to the formula contained in N.C. Gen. Stat. § 135-5(d4). Whisnant's prospective long-term disability benefits under N.C. Gen. Stat. § 135-5(d4) have been unlawfully and unconstitutionally impaired, diminished and violated.

24. Whisnant has been harmed by being assessed an overpayment through no fault of his own and by having all prospective long-term disability benefits garnished and reduced to pay back the assessed overpayment and by being underpaid his monthly and past benefits as a consequence of Respondents-Defendants' failure to calculate his retirement benefits in accordance with N.C. Gen. Stat. § 135-5(d4).

25. Respondents-Defendants' violation of Whisnant's constitutional and statutory rights, as alleged in this *Petition For Judicial Review* and *Class Action Complaint*, have been continuous in nature in that the unlawful garnishment of payments of Whisnant's monthly long-term disability benefits under N.C. Gen. Stat. § 135-5(d4) have occurred each month through the present.

C. *FAULKENBURY*

26. Respondents-Defendants' aforesaid actions violate Chapter 135 of the General Statutes and . . . the Constitution[] of the United States . . . because, among other reasons, Whisnant's vested right are and have been unlawfully and

unconstitutionally impaired, diminished and violated as announced in *Simpson v. North Carolina Local Governmental Retirement System*, 88 N.C.App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988) and *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, 453 S.E.2d 422 (1997).

27. Whisnant was employed with the North Carolina Department of Correction from July of 1985 until April of 2000, when he retired after sustaining an on-the-job accident which left him unable to work. At the time Whisnant began his employment with the Department of Correction, the statutory provision which controlled his disability retirement benefits was N.C. Gen. Stat. § 135-5(d4)(1985), which did not contain any Social Security offset provision. Nonetheless, the Retirement System calculated Whisnant's benefits under the provisions of the Disability Income Plan, N.C. Gen. Stat. § 135-100 *et seq.*, which contains a Social Security offset provision. The Retirement System has been retaining Whisnant's monthly Disability Income Plan long-term disability benefits to "repay" the amount it purportedly overpaid due to Whisnant receiving Social Security disability benefits.

28. Whisnant's property rights are controlled by the statute as it existed when he began employment. *Faulkenbury*, 453 S.E.2d 422. The controlling statute is N.C. Gen. Stat. § 135-5(d4), which did not contain any Social Security offset provision. After working for the Department of Corrections for five years, Whisnant fulfilled his obligation under the contract and his rights vested.

Therefore, Whisnant should not have had his disability retirement benefits calculated under the Disability Income Plan, but, rather, should have had his disability retirement benefits calculated using the formula contained in N.C. Gen. Stat. § 135-5(d4).

29. In *Faulkenbury*, the Supreme Court of North Carolina has held that State employees' property rights in their retirement benefits are contracts. The terms of the employment contracts are created at the time employment begins. "[A]t the time the [state employees] started working for the state or local government, the statutes provided what the [employees'] compensation in the way of retirement benefits would be. The [employees] accepted these offers when they took the jobs. This created a contract." *Faulkenbury*, 345 N.C. at 690, 483 S.E.2d at 427. "[W]hen the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and **who fulfilled certain conditions**, this could reasonably be considered by those persons as offers by the state or local government to **guarantee the benefits if those persons fulfilled the conditions**. When they did so, the contract was formed." *Id.* at 691, 483 S.E.2d at 427 (emphasis added). "The state and local governments **on that date** offered certain things to the [employees], which the [employees] accepted by continuing in their employment." *Id.* at 693, 483 S.E.2d at 428 (emphasis added). "The [employees] are entitled to what they bargained for **when they accepted employment** with the state and local governments." *Id.* at 693, 483 S.E.2d at 429 (emphasis added). The employee's property rights

vest after five years of service. N.C. Gen. Stat. § 135-1 *et seq.* (1985).

30. Whisnant's disability retirement benefits should be recalculated in accordance with N.C. Gen. Stat. § 135-5(d4)(1985)(**Exhibit 6**), which provides:

> Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982. – Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and credible servers he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

31. Whisnant should be repaid all funds due to him under the recalculation and all funds that the Retirement System has been retaining due to the purported overpayment under the Disability Income Plan.

D. FIRST CLAIM FOR RELIEF

32. Whisnant repeats, adopts and incorporates by reference the allegations contained in the foregoing paragraphs as if fully repeated herein.

33. The Court should reverse the January 24, 2007 *Final Agency Decision* of the Board of Trustees of the Teachers' and State Employees' Retirement System and the Administrative Law Judge's September 19, 2006 *Decision*.

E. SECOND CLAIM FOR RELIEF

(Violation of the Impairment . . . Clause[], U.S. Constitution, Art. I § 10, cl. 1 . . .)

34. Whisnant repeats, adopts and incorporates by reference the allegations contained in the foregoing paragraphs as if fully repeated herein.

35. Respondents-Defendants' garnishment of Whisnant's long-term disability benefits and failure to calculate and pay him his disability retirement benefits in accordance with N.C. Gen. Stat. § 135-5(d4)(1985) constitutes an impairment of contract under Article I § 10, cl. 1 of the U.S. Constitution . . .

***

46. Questions of law and fact common to the member of the class predominate over any

questions affected only an individual member or members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

47. The Class Members for whose benefit this action is brought are so numerous that joinder of all Class Members is impracticable. The exact number of members in the Class is unknown to Whisnant. However, the number of these persons is reasonably believed to be in excess of three hundred (300) persons and can be determined from records maintained by Respondents-Defendants. The claims of the representative Plaintiff Whisnant are typical of all members of the Class, and Plaintiff Whisnant has no interests which are adverse or antagonistic to the interests of the Class.

***

49. The Class is proper for certification under Rule 23 of the North Carolina Rules of Civil Procedure. The claims of the putative Class grow out of the same actions and policies, rest on the same grounds, involve identical issues of law, and apply equally to all members of the Class.

***

51. There are questions of law and fact that are common to the members of the Class and predominate over questions affecting individual members.

***

53. Respondents-Defendants have acted or refused to act and will continue to act or refuse to act on grounds generally applicable to the Class, thereby making appropriate injunctive or declaratory relief with respect to the Class as a whole.

54. Plaintiff Whisnant seeks to establish a common fund on behalf of the Class for the sums recovered from Respondents-Defendants.

55. This is a Class Action Complaint for damages and other relief, and for a Declaratory Judgment pursuant to N.C. Gen. Stat. § 1-253 *et seq*, and for a Writ of Mandamus or other appropriate order.

WHEREFORE, Plaintiff Harry Whisnant prays that the Court:

1. Pursuant to N.C. Gen. Stat. § 1-253 *et seq*. declare: Plaintiff and all other class members are vested with disability retirement benefits in accordance with the statutory provisions identified in this Complaint;

2. Pursuant to N.C. Gen. Stat. § 1-253 *et seq*. declare: N.C. Gen. Stat. § 135-5(d4) unconstitutionally fails to "grandfather" Plaintiff and other class members;

3. The Court certify this action as a class action;

***

5. The Court issue and order, in the form of a Writ of Mandamus or otherwise, requiring the Retirement System and Board of Trustees to pay Plaintiff all funds to which he and other class members are entitled;

***

7 The Court award Plaintiff and other class members such other and further relief as it deems just and proper.

Respectfully submitted, this the 23rd day of February, 2007.

SCHILLER & SCHILLER, PLLC

By: /s/ David G. Schiller
David G. Schiller (NCSB # 26713)

/s/ Kathryn H. Schiller
Kathryn H. Schiller (NCSB # 33430)

/s/ Marvin Schiller
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Filed August 21, 2006

STATE OF NORTH CAROLINA
IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
COUNTY OF CUMBERLAND
06 DST 5091

HARRY WHISNANT,	)
	)
Petitioner,	)
	)
v.	)
	)
TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION; AND THE STATE OF NORTH CAROLINA;	)
	)
Respondent.	)

MOTION TO DISMISS
OR, IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT

NOW COME Respondents, by and through their undersigned counsel, and hereby move to

dismiss the petition for contested case hearing filed by Petitioner pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. In the alternative, Respondents move pursuant to Rule 56 for summary judgment, on the basis that there exists no genuine issue of material fact and Respondents are entitled to judgment as a matter of law. In support thereof Respondents show the following:

1. While Petitioner has named several State entities as Respondents, the only action of which he complains is the withholding of a portion of his long-term disability ("LTD") benefits, and the only one of these entities which he claims is responsible for that action is the Department of State Treasurer, Retirement Systems Division. Petitioner does not contend that any of the other State entities named as Respondents, separate and apart from the Retirement Systems Division, had any role whatsoever in the withholding of his disability benefits. On that basis, all Respondents except the Retirement Systems Division should be dismissed from this action.

2. Petitioner's sole claim is that the Retirement Systems Division determined that he had incurred an overpayment of his LTD payments, as set forth in his attachments to the Petition. As explained in those attachments, the overpayment which was assessed was the result of Petitioner's award of Social Security disability benefits. See Exhibit A to Petition

3. The contractual, statutory, and constitutional rights which Petitioner claims have

been violated by the Retirement Systems Division's actions are Petitioner's rights to long-term disability benefits. Those rights, as Petitioner contends, derive by virtue of Petitioner's membership in the Teachers' and State Employees' Retirement System. (Contrary to Petitioner's references to N.C.G.S. §§ 135-50 and 135-55 in ¶¶ 2 and 8 of the Petition, it does not appear that Petitioner has ever been a member of the Consolidated Judicial Retirement System; in fact, such membership would render him ineligible for the Disability Income Plan. N.C.G.S. § 135-103(a).) Specifically, those rights related to long-term disability benefits are conferred by N.C.G.S. § 135-100, *et seq*.

4. N.C.G.S. § 135-106(b) provides for monthly long-term disability benefits according to a statutory formula. It further provides that a beneficiary's LTD benefit "*shall be. . . reduced*" by the amount of any Social Security disability award which the beneficiary receives. (Emphasis added.)

5. As admitted by Petitioner in his Responses to Respondents' Requests for Admissions, a copy of which is attached hereto, Petitioner was awarded LTD benefits effective in April 2000. At that time, Petitioner signed an agreement letter acknowledging his obligation to repay any overpayment of LTD benefits which might arise by virtue of a retroactive Social Security disability award, pursuant to N.C.G.S. § 135-106(b). (Request for Admissions #2) As further indicated in his Exhibits to his Petition, Petitioner did, in fact, receive a Social Security disability award, which resulted in an overpayment of his LTD benefits. To

incorporate a separate document by reference is to declare that the former document shall be taken as part of the document in which the declaration is made, as much as if it were set out at length therein. *Booker v. Everhart*, 294 N.C. 146, 152, 240 S.E.2d 360, 363 (1978). Further, Petitioner has now admitted that he was awarded disability benefits from Social Security effective August 1999. (Request for Admissions #3)

6. Petitioner does not deny that he was awarded Social Security disability benefits. He does not deny that the award of Social Security disability benefits resulted in an overpayment of his long-term disability benefits. The Retirement System is statutorily authorized to offset the Petitioner's long-term benefit in order to recover the overpayment.

> Notwithstanding any provisions to the contrary, any overpayment of benefits to a member in a State-administered retirement system or the former Disability Salary Continuation Plan or the Disability Income Plan of North Carolina may be offset against any retirement allowance, return of contributions or any other right accruing under this Chapter to the same person. . . .

N.C.G.S. § 135-9 (2006).

7. While Petitioner makes general assertions that the Retirement System's efforts to collect the overpayment in long-term disability

benefits violate the State and federal constitutions, Chapter 135, 42 U.S.C. § 1983, and are a breach of "fiduciary duties" owed to Petitioner, it is clear from the facts alleged by Petitioner that the Retirement System correctly applied the provisions of N.C.G.S. § 135-106(b) in determining that there had been an overpayment, and that it is statutorily authorized to collect such overpayment by the offset of future benefits. Moreover, such authority has further been memorialized in a contractual agreement signed by Petitioner.

8. Because Petitioner made reference to a Social Security disability award as early as May 2002, when he submitted to the Retirement System his Statement of Income for 2001, the Retirement System determined that it would not seek to collect any amounts which Petitioner was overpaid after May 2, 2002. It therefore undertook to reduce the amount of the overpayment to $30,561.39, down from an initial calculation of $48,260.64, and to extend the repayment period to seven years. See Attachments A and B to Petition. Petitioner does not contend that the actual amount of his overpayment was less than $30,561.39.

9. Based on the foregoing recital, there are no issues of fact to be determined, and Respondents are entitled to judgment as a matter of law.

WHEREFORE, Respondents request that the matter be dismissed for failure to state a claim or, in the alternative, that summary judgment be entered in favor of Respondents.

Respectfully submitted, this the 21st day of August, 2006.

/s/ Robert M. Curran
Robert M. Curran
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State Bar No. 12375

Filed March 31, 2006

STATE OF NORTH CAROLINA IN THE OFFICE
OF ADMINISTRATIVE HEARINGS
COUNTY OF CUMBERLAND
06 DST 5091

HARRY WHISNANT,	)
	)
Petitioner,	)
	)
v.	)
	)
TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a corporation, BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a body politic and corporate; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, and THE STATE OF NORTH CAROLINA,	)
	)
Respondents.	)

PETITION

PETITIONER hereby petitions the Office of Administrative Hearings pursuant to N.C. Gen. Stat. ' 150B-23(a) for a hearing in accordance with Chapter 150B and all applicable statutes, rules, and regulations of the State of North Carolina and in accordance with the Constitutions of North Carolina and the United States. This Petition is a direct

appeal from an adverse action of the Respondent agency, its officers, agents, and those acting on behalf of the agency in this matter. Petitioner additionally invokes the protection afforded to permanent or career state employees under Chapters 126 and 150B of N.C. General Statutes, policies and procedures of the N.C. State Personnel Commission, the State Personnel Manual, and the North Carolina Administrative Code. Respondent has deprived Petitioner of property, substantially prejudiced Petitioner's rights, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by rule or law.

Petitioner contends that Respondent is unlawfully garnishing his long-term disability income in contravention of the . . . U.S. Constitution, Article I, Section 10 . . . Petitioner has a property interest in the long-term disability income he is entitled to and earned during his employment with Respondent. Prior to his disability retirement, Petitioner had been a State employee for approximately fifteen (15) years.

Petitioner further alleges and says:

PARTIES AND JURISDICTION

1. Petitioner Harry Whisnant is a citizen and resident of Hope Mills, Cumberland County, North Carolina, is subject to the jurisdiction of this Court, and is a retired member of the of North Carolina.

2. Respondent TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a corporation, [hereinafter the "TSERS"] has been established pursuant to N.C.G.S. § 135-50 *et seq.*, and is authorized to conduct all business, invest all of its funds, cash, securities and other property held in accordance with Chapter 135 of the North Carolina General Statutes for the benefit and welfare of members of the System.

3. Respondent BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA is the administering Board for the TSERS [hereinafter the "Board"] is a body politic and corporate established pursuant to Chapter 135-6 and is vested with the general administration and responsibility for the proper operation of TSERS, and is the trustee of its funds under Chapter 135.

4. Respondent NORTH CAROLINA DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION is an administrative department of the Respondent STATE OF NORTH CAROLINA established pursuant to N.C.G.S. § 143A-31 et seq.

5. Respondent STATE OF NORTH CAROLINA is a state of the United States.

6. Respondent BOARD is a fiduciary in its relationship with members and beneficiaries of the TSERS, including the Petitioner.

7. Respondents' acts complained of herein constitute a . . . violation of vested contractual rights, unlawful taking of property in violation of statutes, [and] federal . . . constitutional violations . .

8. Petitioner is a member of TSERS under N.C.G.S. § 135-55, and at the times herein complained of was entitled to receive benefits under N.C.G.S. § 135-50, et seq. The denial of Petitioner's benefits during the period herein complained of caused Petitioner to receive less than the amount of monthly benefits to which he is entitled, as alleged hereafter.

9. This is a Petition for recompense of monthly payments of money that have been withheld and will be withheld in trust, and other relief, an Action for a Declaratory Judgment pursuant to N.C.G.S. § 1-253 et seq, and for a Writ of Mandamus or other appropriate order.

10. By letter dated January 30, 2006, Respondent North Carolina Department of State Treasurer, Retirement Systems Division Director Michael L. Williamson informed Petitioner that Petitioner has the right to appeal the decision in the Office of Administrative Hearings within sixty (60) days. The January 30, 2006 Williamson letter is incorporated by referenced and is attached hereto as **Exhibit A**.

FACTS GIVING RISE TO PETITIONERS' CLAIMS FOR RELIEF

11. Petitioner began employment with the State in July of 1985, serving in the North Carolina

Department of Correction. Petitioner completed his continuous service to the State with the North Carolina Department of Correction, Division of Community Corrections as an Intensive Case Officer until his retirement in or about April of 2000. During Petitioner's service to the State of North Carolina, he made monthly cash contributions, worked for, earned additional employer contributions to TSERS, and thereby acquired vested rights in TSERS. Thereafter, Petitioner continued to serve the State of North Carolina until he retired in 2000. Petitioner earned a total of about fifteen (15) years of creditable service in TSERS.

12. Petitioner, as a vested member of the TSERS, contends that Respondents have and will continue to unconstitutionally and unlawfully retain his monthly long-term disability benefits beginning on or about February 2006.

13. Petitioner suffered an on-the-job injury on January 20, 1999. Petitioner was left disabled and unable to perform his work duties after surgery related to the on-the-job injury. Petitioner began receiving long-term disability benefits in April of 2000. Petitioner also began receiving Social Security benefits in 2000.

14. Petitioner dutifully provided to Respondent, Department of Treasurer, Retirement Systems Division copies of the Social Security benefits received by Petitioner on an annual basis, beginning in 2000.

15. Petitioner was notified on or about October 28, 2005 by Thomas G. Causey, Chief of the

Benefits Section of the North Carolina Retirement Systems Division, that the Respondent had failed to reduce the Petitioner's long-term disability benefit by the amount of Social Security income received for the period beginning April 25, 2000 until October 31, 2005. Respondent contended Petitioner was overpaid $48,260.64. The October 28, 2005 letter from Thomas G. Causey is attached herein as **Exhibit B**.

16. Petitioner received a letter dated November 16, 2005 from Troy Scoggins, Chief of the Accounting Section of the North Carolina Retirement Systems Division stating that there had been a miscalculation in the alleged overpayment and stated that the amount owed by Petitioner had been reduced to $30,561.39. The November 16, 2005 letter from Troy Scoggins is attached herein as **Exhibit C**.

17. Petitioner diligently contacted representatives of the Department of Revenue, Retirement Systems Division to discuss the matter. Petitioner spoke with Glen Wall of the Retirement Systems Division on several occasions. Mr. Wall informed Petitioner that parts of Petitioner's file had been lost on at least two (2) different occasions by the Retirement Systems Division.

18. Petitioner sent a letter dated November 12, 2005 to appeal the overpayment assessed. Petitioner received a letter dated January 30, 2006 from Respondent North Carolina Department of State Treasurer, Retirement Systems Division Director Michael L. Williamson informing Petitioner that the overpayment of $30,561.39 is final and that

Petitioner has the right to appeal the decision in the Office of Administrative Hearings within sixty (60) days. (**Exhibit A.**)

19. Respondents' aforesaid actions violate Chapter 135 of the General Statutes and the Constitution[ ] of the United States . . ., Petitioner has a vested property right in the long-term disability benefits received and consumed and that Petitioner's prospective long-term disability benefits have been unlawfully and unconstitutionally impaired, diminished and violated.

20. Petitioner has been harmed by being assessed an overpayment through no fault of his own and by having all prospective long-term disability benefits garnished and reduced to pay back the assessed overpayment.

21. Respondents' violation of Petitioner's constitutional and statutory rights, as alleged in this Petition, have been continuous in nature in that the unlawful garnishment of payments of Petitioner's monthly long-term disability benefits have occurred each month through the present.

22. Respondents' aforesaid actions violate Chapter 135 of the General Statutes and . . . the Constitution[] of the United States . . ., because, among other reasons, Petitioner's vested right are and have been unlawfully and unconstitutionally impaired, diminished and violated as announced in *Simpson v. North Carolina Local Governmental Retirement System*, 88 N.C.App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d

559 (1988) and *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, 453 S.E.2d 422 (1997).

***

RELIEF REQUESTED

31. Petitioner repeats, adopts and incorporates by reference the allegations contained in the foregoing paragraphs as if fully repeated herein.

32. As a consequence of Respondents' acts complained of herein, Petitioner is entitled to have a constructive or resulting trust impressed upon all sums of payments withheld by Respondents to which Petitioner is entitled, as alleged herein above, the actuarial equivalent of the payments withheld and interest thereon as provided by Chapter 135.

WHEREFORE, Petitioner requests of the Office of Administrative Hearings as follows:

1. A hearing;

2. A declaration that Petitioner is entitled to have a constructive or resulting trust impressed upon all sums of payments withheld by Respondents to which Petitioner is entitled, as alleged herein above, the actuarial equivalent of the payments withheld and interest thereon as provided by Chapter 135;

3. A declaration that Petitioner's property rights in TSERS, as alleged herein

above, have been unlawfully and unconstitutionally impaired, diminished and violated;

4. An Order, in the form of a Writ of Mandamus or otherwise, requiring the TSERS and its Trustees to pay Petitioner all funds to which he is entitled;

5. That Petitioner have and recover of Respondents costs, fees and interest in accordance with law; and

6. All such other and further relief to which the Petitioner is entitled.

Respectfully submitted, this the 31st day of March, 2006.

SCHILLER & SCHILLER, PLLC

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UNITED STATES CONSTITUTION

The Impairment of Contract Clause, Article I, Section 10, Clause 1.

"No State shall ... pass any ... Law impairing the Obligations of Contracts ... ."

NORTH CAROLINA GENERAL STATUTES

ARTICLE 1.

Retirement System for Teachers and State Employees

N.C. Gen. Stat. § 135-1. Definitions. [1985]

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

***

(3) "Annuity" shall mean payments for life derived from that "accumulated contribution" of a member. All annuities shall be payable in equal monthly installments.

***

(6) "Beneficiary" shall mean any person in receipt of a pension, an annuity, a retirement allowance or other benefit as provided by this Chapter.

***

(7) "Board of Trustees" shall mean the Board provided for in G.S. 135-6 to administer the Retirement System.

***

(10) "Employee" shall mean all full-time employees, agents or officers of the State of North Carolina or any of its departments . . . .

***

(11) "Employer" shall mean the State of North Carolina, the county board of education, the city board of education, the State Board of Education, the board of trustees of the University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, or any other agency of and within the State by which a teacher or other employee is paid.

***

(13) "Member" shall mean any teacher or State employee included in the membership of the System. . . .

***

(16) "Pensions" shall mean payments for life derived from money provided by the State of North Carolina, and by county or city boards of education. All pensions shall be payable in equal monthly installments.

***

(20) "Retirement" shall mean the withdrawal from active service with a retirement allowance granted under provisions of this Chapter.

***

(21) "Retirement allowance" shall mean the sum of the "annuity and the pensions," or any optional benefit payable in lieu thereof.

***

(22) "Retirement System" shall mean the Teachers' and State Employees' Retirement System of North Carolina as defined in G.S. 135-2.

***

(23) "Service" shall mean service as a teacher or State employee as described in subdivision (10) or (25) of this section.

***

(25) "Teacher" shall mean any teacher . . . in any educational institution supported by and under the control of the State . . . .

N.C. Gen. Stat. § 135-2. Name and date of establishment. [1985]

A Retirement System is hereby established and placed under the management of the Board of Trustees for the purpose of providing retirement allowances and other benefits under the provisions of this Chapter for teachers and State employees of the State of North Carolina. The Retirement System so created shall be established as of the first day of July, 1941.

It shall have the power and privileges of a corporation and shall be known as the "Teachers' and State Employees' Retirement System of North Carolina," and by such name all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held.

N.C. Gen. Stat. § 135-3. Membership. [1985]

The membership of this Retirement System shall be composed as follows:

(1) All persons who shall become teachers or State employees after the date as of which the Retirement System is established. *** On and after July 1, 1955, membership in the Retirement System shall begin immediately upon the . . . employment of a "teacher or employee," as the terms are defined in this Chapter.

N.C. Gen. Stat. § 135-5. Benefits. [1985]

(a) Service Retirement Benefits.—

(1) Any member may retire upon written application to the board of trustees setting forth at what time, as of the first day of a calendar month, not less than 30 days nor more than 90 days subsequent to the execution of and filing thereof, he desires to be retired: Provided, that the said member at the time so specified for his retirement shall have attained the age of 60 years and have at least five years of membership service or shall have completed 30 years of creditable service.

***

(b7) Service Retirement Allowance of Members Retiring on or after July 1, 1980 — Upon retirement from service, in accordance with subsection (a) above, on or after July 1, 1980, a member shall receive a service retirement allowance computed as follows:

(1) If the member's service retirement date occurs on or after his sixty-fifth birthday or after the completion of 30 years of

creditable service, such allowance shall be equal to one and fifty-seven hundredths percent (1.57%) of his average final compensation, multiplied by the number of years of his creditable service.

(2) If the member's service retirement date occurs after his sixtieth and before his sixty-fifth birthday and prior to his completion of 30 or more years of creditable service, his retirement allowance shall be computed as in (1) above but shall be reduced by one-quarter of one percent (1/4 of 1%) thereof for each month by which his retirement date precedes the first day of the month coincident with or next following his sixty-fifth birthday.

(3) If the member's service retirement date occurs before his sixtieth birthday and prior to his completion of 30 or more years of creditable service, his service retirement allowance shall be the actuarial equivalent of the allowance payable at the age of 60 years as computed in (2) above.

***

(c) Disability Retirement Benefits. — Upon the application of a member ... who has had five or more years of creditable service may be retired by the board of trustees ... on a disability allowance: Provided, that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent, and that such member should be retired. . . .

***

(d4) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and credible servers he would have had had he continued in service until the earliest

date on which he would have qualified for an unreduced service retirement allowance.

N.C. Gen. Stat. § 135-5. Benefits. [1988]

(d4) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982, but prior to January, 1988. — Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, but prior to January 1, 1988, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and credible servers he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

N.C. Gen. Stat. § 135-6. Administration. [1985]

(a) Administration by Board of Trustees; Corporate Name; Rights and Powers; Tax Exemption. — The general administration and responsibility for the proper operation of the Retirement System and for making effective the

provisions of the Chapter are hereby vested in a Board of Trustees . . . .

The Board of Trustees shall be a body politic and corporate under the name "Board of Trustees Teachers' and State Employees' Retirement System"; and as a body politic and corporate shall have the right to sue and be sued . . . .

N.C. Gen. Stat. § 135-8. Method of Financing. [1985]

(a) Funds to Which Assets of Retirement System Credited. – All of the assets of the Retirement System shall be credited according to the purpose for which they are held to one of four funds, namely, the annuity savings fund, the annuity reserve fund, the pension accumulation fund, and the pension reserve fund.

(b) Annuity Savings Fund. — The annuity savings fund shall be a fund in which shall be accumulated contributions from the compensation of members to provide for their annuities. Contributions to any payments from the annuity savings fund shall be made as follows:

***

Notwithstanding the foregoing, effective July 1, 1975, with respect to the period of service commencing on July 1, 1975, the rate of such deductions [each employer shall cause to be deducted from the salary of each member on each and every payroll of such employer for each and every payroll

period] shall be six per centum (6%) of the compensation received by any member. ***

(2) *** Every member shall be deemed to consent and agree to the deductions made and provided for herein and shall receipt for his full salary or compensation, and payment of salary or compensation less said deduction shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment, except as to the benefits provided under this Chapter.

***

(d) Pension Accumulation Fund. – The pension accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contribution made by employers and from which shall be paid all pensions and other benefits on account of members with prior service credit. Contributions to and payments from the pension accumulation fund shall be made as follows:

(1) On account of each member there shall be paid in the pension accumulation fund by employers an amount equal to a certain percentage of the actual compensation of each member to be known as the "normal contribution," and an additional amount equal to a percentage of his actual compensation to be known as the "accrued liability contribution." The rate per centum of such contributions shall be fixed on the basis of the liabilities of the Retirement System as shown by actuarial valuation. Until the first valuation the normal contribution shall be two and fifty-seven one-hundredths percent (2.57%) for teachers, and one and fifty-seven one-hundredths percent (1.57%) for State employees, and the accrued liability contribution shall be two and ninety-four one-hundredths percent (2.94%) for teachers and one and fifty-nine one-hundredths percent (1.59%) of the salary of other State employees.

(2) On the basis of regular interest and of such mortality and other tables as shall be adopted by the Board of Trustees, the actuary engaged by the Board to make each valuation required by this Chapter during the

period over which the accrued liability contribution is payable, immediately after making such valuation, shall determine the uniform and constant percentage of the earnable compensation of the average new entrant throughout his entire period of active service which would be sufficient to provide for the payment of any pension payable on his account. The rate per centum so determined shall be known as the "normal contribution" rate. After the accrued, liability contribution has ceased to be payable, the normal contribution rate shall be the rate per centum of the earnable salary of all members obtained by deducting from the total liabilities of the pension accumulation fund the amount of the funds in hand to the credit of that fund and dividing the remainder by one per centum of the present value of the prospective future salaries of all members as computed on the basis of the mortality and service tables adopted by the Board of Trustees and regular interest. The normal rate of, contribution shall be determined by the actuary after each valuation.

***

(f) Collection of Contributions. —

(1) The collection of members' contributions shall be as follows:

a. Each employer shall cause to be deducted on each and every payroll of a member for each every payroll subsequent to the date of establishment of the Retirement System the contributions payable by such member as provided in this chapter, ..., payable to the Teachers' and State Employees' Retirement System of North Carolina ... .

(2) The collection of employers' contributions shall be made as follows:

a. Upon the basis of each actuarial valuation provided herein there shall be prepared biennially and certified to the Department of Administration a statement of the total amount necessary for the ensuing biennium to the pension accumulation and expense funds, as provided under subsections (d) and (f) of this section, and these funds shall be handled and disbursed in

accordance with Chapter 100, Public Laws of 1929, and amendments thereto (G.S. 143-1 et seq.), known as the Executive Budget Act.

(g) Merger of Annuity Reserve Fund and Pension Reserve Fund into Pension Accumulation Fund. – Notwithstanding the foregoing, effective at such date not later than December 31, 1959, as the Board of Trustees may determine, the annuity reserve fund and the pension reserve fund shall be merged into and become a part of the pension accumulation fund, provided that such merger shall in no way adversely affect the rights of any members or retired members of the System and further provided the Board of Trustees shall be and hereby is authorized to make such changes in the accounting methods and procedures of the System from time to time as, in its opinion, are in the interest of sound and proper administration of the System.

N.C. Gen. Stat. § 135-12. Obligation of maintaining reserves and paying benefits. [1985]

The maintenance of annuity reserves and pension reserves as provided for and regular interest creditable to the various funds as provided in G.S. 135-8, and the payment of all pensions, annuities, retirement allowances, refunds and other benefits granted under the provisions of this Chapter, are hereby made obligations of the pension accumulation fund. All income, interest and dividends derived

from deposits and investments authorized by this Chapter shall be used for the payment of the said obligations of the said fund.

N.C. Gen. Stat. § 135-18.4. Reservation of the power to change. [1985]

The General Assembly reserves the right at any time and from time to time, and if deemed necessary or appropriate by said General Assembly in order to coordinate with any changes in the benefit and other provisions of the Social Security Act made after January 1, 1955, to modify or amend in whole or in part any or all of the provisions of the Teachers' and State Employees Retirement System of North Carolina.

ARTICLE 6.

Disability Income Plan of North Carolina

N.C. Gen. Stat. § 135-101. Definitions. [1988]

The following words and phrases as sued in this Article, unless a different meaning is plainly required by the context, shall have the following meanings:

***

(2) "Beneficiary" shall mean any person in receipt of a disability allowance or other benefit as provided in this Article.

***

(4) "Board of Trustees" shall mean the Board of Trustees of the Teachers' and State Employees' Retirement System as provided in G.S. 135-6.

***

(8) "Employee" shall mean any employee as the term is defined in G.S. 135- 1(10).

***

(9) "Employer" shall mean any employer as the term is defined in G.S. 135-1(11).

***

(11) "Member" shall mean any member as the term is defined in G.S. 135-1(13).

***

(13) "Participant" shall mean any teacher or employee eligible to participate in the Plan as provided in G.S. 135-103.

***

(14) "Plan" shall mean the Disability Income Plan of North Carolina as provided in this Article.

***

(15) "Retirement" shall mean the withdrawal from active service with a retirement allowance granted under the provisions of Article 1 of this Chapter.

***

(16) "Retirement System" shall mean the Teachers' and State Employees' Retirement System of North Carolina as defined in G.S. 135-2.

***

(17) "Service" shall mean service as a teacher or employee as defined in G.S. 135-1(10) or G.S. 135-1(25).

***

(18) "State" shall mean the State of North Carolina.

***

(19) "Teacher" shall mean any teacher as the term is defined in G.S. 135-1(25).

N.C. Gen. Stat. § 135-102. Administration. [1988]

(a) The provisions of this Article shall be administered by the Department of State Treasurer and the Board of Trustees of the Teachers' and State Employees' Retirement System and all expenses in connection with the administration of the Plan, except for expenses incurred by and properly charged to the employer, shall be charged against and paid from the trust fund as created and provided in this Article.

N.C. Gen. Stat. § 135-103. Eligible participants. [1988]

(a) The eligible participants of the Disability Income Plan shall consist of:

(1) All teachers and employees in service and members of the Teachers' and State Employees'

Retirement System or participants of the Optional Retirement Program on January 1, 1988.

(2) All persons who become teachers and employees or re-enter service as teachers or employees and are in service and members of the Teachers' and State Employees' Retirement System or participants of the Optional Retirement Program after January 1, 1988.

(b) The participation of any person in the Disability Income Plan shall cease upon:

(1) The termination of the participant's employment as a teacher or State employee, or

(2) The participant's retirement under the provisions of the Teachers' and Employees' Retirement System or the Optional Retirement Program, or

(3) The participant's becoming a beneficiary under the Plan, or

(4) The participant's death.

N.C. Gen. Stat. § 135-105. Short-term disability benefits. [1988]

(a) Any participant who becomes disabled and is no longer able to perform his usual occupation may, after at least 365 calendar days succeeding his date of initial employment as a teacher or employee and at least one year of contributing membership service, receive a benefit commencing on the first day succeeding the waiting period; provided that the participant's employer and attending physician shall certify that such participant is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred while the participant was a teacher or employee and has been continuous thereafter; provided further that the requirement for one year of contributing membership service must have been earned within 36 calendar months immediately preceding the date of disability and further, salary continuation used during the period as provided in G.S. 135-104 shall count toward the aforementioned one year requirement.

(b) The benefits as provided for in subsection (a) of this section shall commence on the first day following the waiting period and shall be payable for a period of 365 days as long as the participant continues to meet the definition of disability. However, a disabled participant may elect to receive any salary continuation as provided in G.S. 135-104 in lieu of short-term disability benefits; provided further, such election shall not extend the 365 days duration of short-term payments.

(c) The monthly benefit as provided in subsection (a) of this section shall be equal to fifty percent (50%) of 1/12th of the annual base rate of compensation last payable to the participant prior to the beginning of the short-term benefit plus fifty percent (50%) of 1/12th of the annual longevity payment to which the participant would be eligible, to a maximum of three thousand dollars ($3,000) per month reduced by monthly payments for Workers' Compensation to which the participant may be entitled. Provided, that should a participant have earnings in an amount greater than the short-term benefit, the amount of the short-term benefit shall be reduced on a dollar-for-dollar basis by the amount that exceeds the short-term benefit.

(d) The provisions of this section shall be administered by the employer and further, the benefits during the first six months of the short-term disability period shall be the full responsibility of and paid by the employer; Provided, further, that upon the completion of the initial six months of the short-term disability period, the employer will continue to be responsible for the short- term benefits to the participant, however, such employer shall notify the Plan on a quarterly basis of the amount of short-term benefits paid and the Plan shall reimburse the employer the amounts so paid.

(e) During the short-term disability period, a beneficiary may return to service for trial rehabilitation for periods of not greater than 40 continuous days of service. Such return will not cause the beneficiary to become a participant and will not require a new waiting period or short-term

disability period to commence unless a different incapacity occurs. The period of rehabilitative employment shall not extend the period of the short-term disability benefits.

(f) A participant or beneficiary of short-term disability benefits or his legal representative or any person deemed by the Board of Trustees to represent the participant or beneficiary, or the employer of the participant or beneficiary, may request the Board of Trustees to have the Medical Board make a determination of eligibility for the short-term disability benefits as provided in this section or to make a preliminary determination of eligibility for the long-term disability benefits as provided in G.S. 135-106. A preliminary determination of eligibility for long-term disability benefits shall not preclude the requirement that the Medical Board make a determination of eligibility for long-term disability benefits.

(g) The Board of Trustees may extend the short-term disability benefits of a beneficiary beyond the benefit period of 365 days for an additional period of not more than 365 days; provided the Medical Board determines that the beneficiary's disability is temporary and likely to end within the extended period of short-term disability benefits. During the extended period of short- term disability benefits, payment of benefits shall be made by the Plan directly to the beneficiary. (1987, c. 738, s. 29(q).)

N.C. Gen. Stat. § 135-106. Long-term disability benefits. [1988]

(a) Upon the application of a beneficiary or participant or of his legal representative or any person deemed by the Board of Trustees to represent the participant or beneficiary, any beneficiary or participant who has had five or more years of membership service may receive long-term disability benefits from the Plan upon approval by the Board of Trustees, commencing on the first day succeeding the conclusion of the short-term disability period provided for in G.S. 135-105, provided the beneficiary or participant makes application for such benefit within 180 days after the short-term disability period ceases or after salary continuation payments cease, whichever is later; Provided, that the Medical Board shall certify that such beneficiary or participant is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred while a teacher or employee and has been continuous thereafter, that such incapacity is likely to be permanent; Provided further that the Medical Board shall not certify any beneficiary or participant as disabled who is in receipt of any payments on account of the same incapacity which existed when the beneficiary first established membership in the Retirement System.

The Board of Trustees may require each beneficiary who becomes eligible to receive a long-term disability benefit to have an annual medical review or examination for the first five years and thereafter once every three years after the commencement of benefits under this section.

However, the Board of Trustees may require more frequent examinations and upon the advice of the Medical Board shall determine which cases require such examination. Should any beneficiary refuse to submit to any examination required by this subsection or by the Medical Board, his long-term disability benefit shall be suspended until he submits to an examination, and should his refusal last for one year, his benefit may be terminated by the Board of Trustees. If the Medical Board finds that a beneficiary is no longer mentally or physically incapacitated for the further performance of duty, the Medical Board shall so certify this finding to the Board of Trustees, and the Board of Trustees may terminate the beneficiary's long-term disability benefits.

As to the requirement of five years of membership service, any participant or beneficiary who does not have five years of membership service within the 96 calendar months prior to conclusion of the short-term disability period or cessation of salary continuation payments, whichever is later, shall not be eligible for long-term disability benefits.

(b) After the commencement of benefits under this section, the benefits payable under the terms of this section shall be equal to sixty-five percent (65%) of 1/12th of the annual base rate of compensation last payable to the participant or beneficiary prior to the beginning of the long-term benefit plus sixty-five percent (65%) of 1/12th of the annual longevity payment to which the participant or beneficiary would be eligible, to a maximum of three thou-sand nine hundred dollars ($3,900) per

month reduced by any primary Social Security disability benefits and by Workers' Compensation, if any. However, a disabled participant may elect to receive any salary continuation as provided in G.S. 135-104 in lieu of long-term disability benefits; provided such election shall not extend the first 36 consecutive calendar months of the long-term disability period. Notwithstanding the foregoing, upon the completion of four years from the conclusion of the waiting period as provided in G.S. 135-104, the beneficiary's benefit shall be reduced by an amount, as determined by the Board of Trustees, equal to a primary Social Security disability benefit to which the beneficiary might be entitled had the beneficiary been awarded Social Security disability benefits. Provided that, in any event, a beneficiary's benefit shall be reduced by an amount, as determined by the Board of Trustees, equal to a primary Social Security retirement benefit to which the beneficiary might be entitled.

Notwithstanding the foregoing, the long-term disability benefit is payable so long as the beneficiary is disabled until the earliest date at which the beneficiary is eligible for an unreduced service retirement allowance from the Retirement System, at which time the beneficiary would receive a retirement allowance calculated on the basis of the beneficiary's average final compensation at the time of disability as adjusted to reflect compensation increases subsequent to the time of disability and the creditable service accumulated by the beneficiary, including creditable service while in receipt of benefits under the Plan.

(c) Notwithstanding the foregoing, a beneficiary in receipt of long-term disability benefits who has earnings during the first 36 consecutive calendar months of the long-term disability period shall have his long-term disability benefit reduced when the sum of the net long-term disability benefit and the earnings equals one hundred percent (100%) of monthly compensation adjusted as provided under G.S. 135-108. The long-term disability benefit shall be reduced dollar-for-dollar for the amount of earnings in excess of the one hundred percent (100%) monthly limit. Provided further, after the first 36 months of the long-term disability period, a beneficiary's earnings will not result in any reduction of the monthly long-term disability benefit until the monthly earnings equal the net monthly long-term disability benefit. The monthly long-term disability benefit will be reduced by one dollar ($1.00) for each three dollars ($3.00) of monthly earnings in excess of the net long-term disability benefit until the sum of the monthly net long-term benefit and monthly earnings reach one hundred percent (100%) of monthly compensation adjusted as provided under G.S. 135-108, at which point the monthly long-term disability benefit shall be reduced dollar-for-dollar for the amount of earnings in excess of the one hundred percent (100%) monthly limit. Any beneficiary exceeding the earnings limitations shall notify the Plan by the fifth of the month succeeding the month in which the earnings were received of the amount of earnings in excess of the limitations herein provided. Failure to report excess earnings may result in a suspension or termination of benefits as determined by the Board of Trustees. (1987, c. 738, s. 29(q).)

N.C. Gen. Stat. § 135-113. Reservation of Power to Change. [1988]

The benefits provided in this Article as applicable to a participant who is not a beneficiary under the provisions of this Article shall not be considered as part of an employment contract, either written or implied, and the General Assembly reserves the right at any time and from time to time to modify, amend in whole or part or repeal the provisions of this Article.

§ 128-27. Benefits.

(a) Service Retirement Benefits. —

(1) Any member may retire upon written application to the Board of Trustees setting forth at what time, as of the first day of a calendar month, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired: Provided, that the said member at the time so specified for his retirement shall have attained the age of 60 years and have at least five years of creditable service or shall have completed 30 years of creditable service, or if a uniformed policeman or fireman, he shall have attained the age of 55 years and have at least five years of creditable service.

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(c) Disability Retirement Benefits. — Upon the application of a member or of his employer, any member who has had five or more years of creditable service may be retired by the Board of Trustees, on the first day of any calendar month, not less than 30 and not more than 90 days next following the date of filing such application, on a disability retirement allowance: Provided, that the medical board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity was incurred at the time of active employment and has been continuous thereafter, that such incapacity is likely to be permanent, and that such member should be retired;

Provided further the medical board shall determine if the member is able to engage in gainful employment and, if so, the member may still be retired and the disability retirement allowance as a result thereof shall be reduced as in subsection (e) below. Provided further, that the Medical Board shall not certify any member as disabled who:

(1) Applies for disability retirement based upon a mental or physical incapacity which existed when the member first established membership in the system; or

(2) Is in receipt of any payments on account of the same disability which existed when the member first established membership in the system.

The Board of Trustees shall require each employee upon enrolling in the retirement system to provide information on the membership application concerning any mental or physical incapacities existing at the time the member enrolls.